88-222

No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

John O'Reilly, Et. Al. Petitioners

v.

New York Times Co.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REVEREND JOHN T. O'REILLY, Pro Se
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QUESTIONS PRESENTED

1. Whether the Courts below erred when they held each and every individual plaintiff, personal or corporate, to be a limited public figure for each and every claim of action and when they concluded that appellants' limited purpose public figure has not "dissolved with the passage of time"?

2. Whether the Courts below erred when to satisfy the Anderson v. Liberty Lobby Summary judgment standard, they held there was insuffficient evidence of actual malice without allowing full discovery under Rule 56f and in the case of Plaintiff Fr. O'Reilly, no discovery?

3. Whether defendant was entitled to rely on certain privileges as a matter of law?

4. Whether the courts below erred after finding that plaintiffs had not thrust themselves into the forefront of any "business controversy" could still be found to be limited purpose public figures with

respect to the "business controversy" even though any possible "business controversies" were limited to the corporate plaintiff alone.

5. Whether the Courts below erred in accepting the fictitious public figure classifications advanced by defendant, namely "religious controversy" and "business controversy" when this is clearly repudiated by all Supreme Court decisions on public figure determinations.

6. Whether the Court of Appeals and the lower court erred when the lower courts failed to make specific findings with respect to the public figure status of each of the individual priests and to merely equate each of the priests with the corporate plaintiff and then whether the Court of Appeals erred in finding that "while more specific findings with respect to each individual appellant may have been <u>desirable</u> (emphasis added) we see no reversible error in the district court holding."

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IN THE SUPREME COURT OF THE
UNITED STATES

No.

JOHN O'REILLY ET AL., PETITIONER

v.

THE NEW YORK TIMES CO.

PETITON FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Reverend John T. O'Reilly, Reverend Patrick J. Berkery, Reverend Robert J. Cassidy, Reverend John F. Coyne and Corporation, Contemporary Mission, Inc., a Missouri not-for-profit corporation, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-16a) is reported at 842 F.2d 612 (2nd Cir. 1988). The opinion of the district court (App., infra, 17a-74a) is reported at 665 F.Supp.248. The opinion of the court of appeals (App., infra, 75a-90a) is reported at 692 F. 2d 863 (2nd Cir. 1982).

JURISDICTION

The judgement of the court of appeals (App., infra, 16a) was entered on March 16, 1988. On June 16, 1988, Justice Thurgood Marshall extended the time within which to petition for a writ of certiorari to and including July 13, 1988. The jurisdiction of this Court is invoked under the First Amendment of the United States Constitution.

STATEMENT

The article at issue is riddled with distortions, misstatements, and a host of defamatory falsehoods, which whether read alone or together, paint a picture of each individual priest plaintiff as a phony priest who forged his ordination in order to use the religious organization, Mission, as a "cloak" for a profitable business.

Defendant New York Times maintains that Diane Henry (the supposed author) is a competent, thorough, reliable reporter with extensive experience (who was fired summarily along with her husband and editor Nicholas Horrock who defendant maintains never helped Ms. Henry with the article or even discussed it with her), that she interviewed some seventy (70) people, and that the precautions taken and procedures followed by the Times went far beyond the standards of information gathering and dissemination normally followed

by responsible parties. The facts established in the plaintiffs' declarations and affidavits, however, wholly gave the lie to defendant's self-righteous contentions.

For instance, Diane Henry concedes that she lost her notes of the single most important interview of all, namely the October 15, 1980 interview with Fathers Berkery and O'Reilly and William D. O'Reilly. She also admits that she inadvertently erased the tape of her telephone conversation with Father O'Reilly on September 24, 1980. Fortunately, Father O'Reilly was able to record the same conversation (part of the record below), and this Court therefore may hear Ms. Henry "con" Father O'Reilly into reluctantly granting an interview by repeatedly "promising" to be completely fair, and to give both sides of the story. As is set forth in detail below, Ms. Henry did no such thing and in fact never intended to do otherwise. Rather, she went out of her way to misstate the truth, ignoring in the process

clear and convincing evidence of plaintiffs that certain information was false and should therefore not be printed.

Plaintiffs do not know whether Diane Henry did in fact interview seventy (70) persons as she claims, because defendant has repeatedly refused to identify its sources, nor has it turned over most of its notes gathered during its so-called "investigation". Because it has not named its sources, nor afforded access to its notes, defendant is prohibited as a matter of law from relying on these sources to prove its claim of responsible reporting, as it has attempted to do. In fact, defendant may rely only on six (6) specific sources which it has named in its summary judgment motion papers, namely, Monsignor Cusack, Father Mezaros, Monsignor Granich, Father O'Connor, James Harding and Kenneth Graham. Significantly, three of the six sources upon which defendant has placed so much reliance have flatly contradicted the information which Diane

Henry attributed to them. Specifically, Monsignor Cusack, Father Mezaros and Monsignor Granich have repudiated the statements attributed to them by Diane Henry. Moreover, the statements of Mr. Graham upon which defendant attempts to rely are inadmissible since Bufalino v. Associated Press, 692 F. 2d 266, 271 (2d Cir. 1982) held that statements made by a government agency employee such as Mr. Graham are inadmissible in support of a defense of privilege due to a fair and true report based on a report of a judicial or administrative proceeding. Accord: Hogan v. Herald Co., 446 NYS 2d 836 (4th Dept. 1982). Ms. Henry's claim to reliance upon her conversation with James Harding of the United States Postal Service is even more curious, since what Mr. Harding purportedly said cries out for a reporter to get to the bottom of the matter in order to, in the words of her editor, Nora Kerr, check out this inconsistency.

Finally, defendant's reliance upon

Father O'Connor's "contradiction" is especially ironic, since Father O'Connor was denying a lie fed to him by Diane Henry herself. As is corroborated by the taped transcript of the interview of October 15, 1980, neither Father O'Reilly nor Father Berkery ever said they conducted any services, let alone "many services" at St. Catherine's Church in Greenwich. For her part, Ms. Henry lamely swears that "while I do not now recall what I was told about the relationship between CMI and St. Catherine's Church during the interview at plaintiffs' house, I know that I learned from CMI about that church's relationship to the members of CMI". The tape of the interview proves otherwise, of course, as would Ms. Henry's own notes, had she not lost them.

Thus, just as was the case in Karaduman v. Newsday, Inc., 51 N.Y. 2d, 531, 532 (1980), three of the so-called sources upon whom defendant placed primary reliance have repudiated the statements attributed to

them. As in Karaduman, a corporate media defendant should be barred from avoiding trial on these issues by a groundless grant of summary judgment.

The libelous article's principal content, and its thrust, have been succinctly summarized by Judge Friendly when Father O'Reilly's right to represent himself pro se was refused by Judge Broderick of the Southern District. Judge Friendly stated in overturning the lower court:

> "The article said, inter alia, that church officials in St. Louis, led by John Cardinal Carberry, had accused the priests of forging documents for their ordinations; that Monsignor Cusack of the Bridgeport, Conn. Diocese had written that the priests were not recognized by the diocese and were unable to function as Catholic priests; that in 1977 the State of Connecticut had gotten a cease and desist order against them for failing to deliver merchadise; that the Postal Service had charged them with fraud in the sale of bath-oil; that Father John O'Reilly had married, which would normally mean his excommunication from the Roman Catholic Church,but that he said he had switched to the Eastern Rite of the Catholic Church which allows priests to marry;

> and that the Mission's public court record 'raises questions about whether the priests may have cloaked a profitable business in the guise of a religious, tax-exempt organization.' Plaintiffs allege that these and other statements are false or so incomplete as to convey a misleadingly false impression. (O'Reilly v. New York Times Co.,692 F. 2d 863, 864, (2d Cir 1982.)"

Judge Friendly found among others things that Judge Broderick's reasoning was "conclusory", "irrelevant" or "worse" in denying Father O'Reilly's statutory right to represent himself.

REASONS FOR GRANTING THE PETITION

The Court of Appeals and the lower court have decided important questions of constitutional dimension in ways that conflict directly with the Supreme Court's clearly expressed body of law concerning "public figure" and New York Times actual malice standards with regard to the summary judgment process. It is well settled that summary judgment is a drastic device which can only be granted when there is no genuine issue as to any material fact, and when the moving party is entitled to summary judgment as a matter of law. Gladstone v. Fireman's Fund Insurance Co., 536 F. 2d 1403, 1406 (2d Cir. 1976). A court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. Heyman v. Commerce & Industry Insurance Co., 544 F. 2d 1317 (2d Cir. 1975). Because the Court below ruled that each plaintiff was a "public figure" for each of

twenty (20) defamations charged, the existence of "actual malice" and "state of mind" are at issue, and defendant's summary judgment motion must, therefore, hurdle a higher standard than usual. In Yiamouyiammis v. Consumer's Union of U.S., Inc., 619 F. 2d 932 (2d Cir. 1980), Judge Oakes noted at 939 that the Supreme Court has not only rejected the Times' claim that summary judgment is "commonly granted" in a libel action, "but takes almost the opposite position". Id. Because each plaintiff herein contends that the evidence on actual malice has not yet been fully marshalled, plaintiffs have sought and are seeking further discovery, and the "state of mind" problem referred to in the Chief Justice's Hutchinson footnote is thus present (see discussion at 940). Accordingly, in considering the motion for summary judgment, the lower Court should have been mindful of the fact that the Supreme Court believes that a case such as this "does not readily lend itself to summary

disposition". Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979); Accord: Wolston v. Readers Digest Association 443 U.S. 157, 161 n. 3 (1979). The Court below erred in stating: "However, in a libel case in 1986, the (Supreme) Court appears to have reversed fields". He was referring to Anderson v. Liberty Lobby, Inc., 106 F. Ct. 2505 (1986).

This crucial proposition has been further buttressed and explained, not reversed, by the Supreme Court in Anderson v. Liberty Lobby, Inc., 106 F. Ct. 2505 (1986) when the Supreme Court addressed "the question whether the clear and convincing requirement must be considered by a Court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which New York Times applies". Id 2508. It held that the clear and convincing evidence requirement must be considered by a court ruling on a motion for summary judgment. The Court found that "By its very terms, this standard provides that

the mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion for summary judgement: the requirement is that there be no genuine issue of material fact." Id at 2510.

The Court made very clear that its analysis did not address the question of the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment. See Celotex Corp. v. Catrette, ___U.S. ___ 91 L. ed. 2d 265, 106 S. Ct.2548 (1986). " Respondents have not raised this issue here, and for the purposes of our discussion, we assume that the moving party has met initially the requisite evidentiary burden." (Footnote 4).

The Court also stated: "The adverse party 'must set forth specific facts showing that there is a genuine issue for trial'" (Footnote 5).

Footnote 5 also states "This requirement in turn is qualified by Rule

56(f)'s provision that summary judgment be refused where the non-moving party has not had the opportunity to discover information that is essential to its opposition. In our analysis, we assume that both parties have had ample opportunity for discovery."

Throughout the decision in Anderson v. Liberty Lobby, Inc., supra. the Court constantly emphasizes the principle that for the purposes of this summary judgment, the lower Courts were bound to hold to the established doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment. In fact, the lower Courts did not do this. Judge Broderick, in hearing the defendant's motion for summary judgment, went beyond the traditional summary judgment inquiry and construed evidence, time and time again, in the light most favorable to the New York Times defendant. The Supreme Court has warned: "Our holding that the clear and convincing standard of proof should be taken

in account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavit. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Adickes, Id

"Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny the summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." Kennedy v. Silas Mason Co. , 334 U.S. 249, 92 L. Ed. 1347, 68 S. Ct. 1031 (1948).Anderson v. Liberty Lobby, Id

The article as a whole, as well as

the many libelous passages therein, are capable of defamatory meaning. Cianci v. New Times Publ. Co.,,, 639 F. 2d 54, 60 (2d Cir. 1980). The test in New York is whether the libel is reasonably susceptible of a defamatory connotation. Hogan v. Herald Co., 446 N.Y.S. 2d 836 (4th Dept. 1982); James v. Gannett Co., Inc., 40 N.Y. 2d 415, 419 (1976); Restatement 2d Torts Para. 614. The article is replete with accusations of forgery, theft, lying and dishonesty against the priests-plaintiffs and Corporate Plaintiff, Contemporary Mission. Such charges are defamatory per se under New York law. Hogan v . Herald Co., supra; Cianci v. New Times Pub Co.,, supra. Moreover, New York law has long recognized that where clergymen are involved, such charges are especially offensive, because plaintiffs' professions as clerics are called into disrepute. Demarest v. Herring 6 Cow. 76 (N.Y. 1826); Potter v. New York Evening Journal Pub. Co., 74 N.Y.S. 317, 320 (1st Dept. 1902); Smith v. Buffalo

Times, 209 N.Y.S. 225, 227 (1925).

In order to prevail on its defense of public figure, defendant had to meet a strict standard indeed. Waldbaum v. Fairchild Publ, Inc., 627 F. 2d 1287, 1292 (D. C. Cir. 1980). Wolston, supra, at 165. In finding all plaintiffs limited purpose public figures for all libels, the lower Courts were required to find that for each defamation charged, each plaintiff voluntarily injected himself into a pre-existing, continuing, particular public controversy in order to engage the attention of the public in an attempt to influence the resolution thereof. Gertz, v. Welch, Inc., 418 U.S. 323 (1974); Waldbaum, supra.

It is important that the explicit language of the Supreme Court in Time v. Firestone 424 U.S. 448, 456 (1976) be borne in mind. The Court, referring directly to its earlier holding in Gertz v. Welch supra. stated that the Court has sought:

> "(a) more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress

of libelous utterances."

Throughout their written decisions, Judge Broderick and the Court of Appeals scrupulously avoided making any distinctions among plaintiffs as to the relative public figure status of each. Instead, they treated each plaintiff personal or corporate plaintiff as though they were one. Judge Broderick cited no cases in support of his dubious thesis that "them" equals the corporate plaintiff Contemporary Mission, Inc. and vice versa. Fremont Energy v. Seattle Post-Intelligencer, 9 Med. L. Rptr. 1568 (D.C. Wash. 1983) clearly repudiates this proposition. At 1572, the court found that the libel claims of individual plaintiffs who were officers and directors of the corporate plaintiff were not derived from the libel claim of the corporation, because the statements sued on by the individual plaintiffs were not statements about the corporation, but statements allegedly made about plaintiffs themselves. The court held:

> "In the case before the court, the individual plaintiffs are suing over statements which they alleged could be construed as being statements about them personally. Since their claim is independent of the corporation's libel claim, so likewise must be the court's determination of their status as public or private figures."

It is evident, therefore, that a separate determination should have been made with respect to each plaintiff both as to the merits of the defamation charges (that is, is each libel alleged capable of a defamatory meaing with respect to each plaintiff) and as to the status of each plaintiff as a public or private firgure with respect to each of the defamations charged.

Indeed, Judge Meskill, writing for the Court of Appeals for the Second Circuit in Contemporary Mission, Inc., v. Famous Music Corp., 557 F. 2d 918, 927 (2d Cir. 1977), stated that "Mission (The corporate plaintiff, Contemporary Mission, Inc.) was relatively unknown" when referring to its activities as far back as 1974. Since that time, the corporate plaintiff Contemporary

Mission, Inc. and the individual priests-plaintiffs have become even less relatively known, as is clearly demonstrated by the paucity of articles written about plaintiffs since 1974. Defendant effectively conceded that none of plaintiffs were limited purpose public figures when the author of the article, Diane Henry, admitted under oath that prior to commencing research on the article, she had never heard of any of the plaintiffs, despite the fact that she had been living and working in the Connecticut area since 1977, three years prior to the date of publication of the article on November 1, 1980. Similarly, none of her editors who were associated with her on the article had ever heard of plaintiffs prior to editing the article, even though one of the editors, Jonathan Friendly, had written an article some nine years previous about the priests for a small newspaper

The Supreme Court has held that the lower Courts must satisfy the following

elements of proof if it is to rely on limited purpose public figures status. Judge Broderick and the court of appeals failed to show that a:

(1) pre-existing
(2) continuing;
(3) particular;
(4) public controversy existed;
(5) into which each plaintiff;
(6) voluntarily injected himself
(7) in order to engage the attention of the public;
(8) so as to have a major impact on the resolution of the controvery

In Gertz v. Robert Welch, Inc., 418 U.D. 323, the Supreme Court noted at 345:

> "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare".

Thus the Court found that limited purpose public figures are those who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved". (Id). The Court further explained its ruling by stating:

"More commonly, an individual volun-

> tarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (Id at 351)

The Court thereupon explained what was meant by this language when it stated that plaintiff Gertz "plainly did not thrust himself into the vortex of this public issue (i.e. he did not voluntary inject himself into it), nor did he engage the public's attention in an attempt to influence its outcome (i.e. he was not drawn into the controversy and hadn't actively engaged the public's attention in order to influence the outcome thereof.)" (Id at 352). In Gertz, the Court established the basic elements necessary for a media defendant to establish limited public figure status.

In Time, Inc. v. Firestone, supra, the Court further delineated this doctrine. Finding that a "cause celebre" is a controversy of interest to the public, but not a "public controversy", the Court found that plaintiff Firestone was not a limited

purpose public figure simply because he was embroiled in a highly publicized divorce proceeding and because he gave interviews to the press. At 454-456. Moreover, the Court in Firestone clarified its prior doctrine enuntiated in Gertz by holding:

> "And while participants in some litigation may be legitimate'public figures' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a court room."

Thus the Court explained what it meant when it used the term "drawn into a particular public controversy" in its Gertz holding. How can Judge Broderick and the Court of Appeals reconcile this holding with their statements concerning the individual plaintiffs and the corporate plaintiff Contemporary Mission and the Government actions re: business dealings and public figure status?

The Court further developed the doctrine of limited public figure status on June 26, 1979 when it handed down decisions in Wolston v. Readers Digest Assn., supra. and Hutchinson v. Proxmire, supra. In Hutchinson, the Court held that plaintiff Hutchinson, a recipient of federal funds for research projects, which had been reported in the local newspapers, did not render him a limited purpose public figure because Hutchinson did not thrust himself or his views into public controversy to influence others.At 135. The Court held that Hutchinson did not have the regular and continuing access to the media that is one of the accoutrements of having become a public figure. at 136. The Court also held that those charged with defamation cannot, by their own conduct, create their own defense, by making claimant a public figure. at 135. In other words, there must be a pre-existing controversy.

In Wolston,, supra, the Court

further held that the controversy must not only be pre-existing, it must also be continuing. The Court stated that petitioner Wolston, who had been in the center of a flurry of publicity because of a contempt conviction regarding his refusal to testify before a grand jury, had returned to private life, after the "controversy" had subsided. Accordingly, the Court held that there was not a continuing controversy when petitioner's name appeared years later on a list of alleged Soviet agents. The Court held that there was no longer a controversy, but rather that the latest outburst, while it may have been newsworthy, is not conclusive as a public figure issue. At 167. There was no continuing public controversy in 1980 concerning the ordination in 1971. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times. At 167-168. The Court in Wolston reiterated its prior findings that a person must engage the

attention of the public in an attempt to influence the resolution of the issues involved." (at 168). In fact, the Court's decision in Wolston was so strongly against limited public figure status that Justice Blackmun and Justice Marshall in a concurring opinion, stated:

> "The Court seems to hold, in other words, that a person becomes a limited-issue public figure only if he literallly or figuratively 'mounts a rostrum' to advocate a particular view." At 169

It is therefore evident from the foregoing cases and commentaries that beyond doubt, summary judgment is not to be granted absent a finding that defendant has meticulously satisfied each of the elements of limited public figure status mandated by the Supreme Court.

Turning now to the facts in this action, the lower courts attempt to satisfy this burden by advancing a number of long-running "religious and business controversies" which have "surrounded and

embroiled" plaintiffs for the past fifteen years. Such an approach is explicitly condemned by case law, which has repeatedly rejected the concept of "subject matter classification" as to public figures (see Firestone and Wolston, supra.) in favor of case by case determination of the facts taken as a whole. (Waldbaum v. Fairchild, supra. at 1292. Rather than inquiring into "broad debate" regarding plaintiffs' business and religious legitimacy, the lower Courts were required to demonstrate that each plaintiff voluntarily injected himself into a pre-existing, continuing, particular public controversy in order to have a major impact on the resolution thereof, because one does not become a public figure by "defending oneself against actions brought by the State or by others." Firestone, supra. at 1257. In any event, none of plaintiffs "engaged the attention of the public in an effort to influence the resolution of the imagined 'controversy'". An identical analysis results

from an examination of the fictitious "controversy" with the Postal Service over the bath-oil sales. Similarly, plaintiffs cannot be said to have become public figures by virtue of the fact that the corporate plaintiff Contemporary Mission, Inc. had its tax-exempt status revoked by the IRS and its non-profit mailing permit revoked by the U.S. Postal Service and that it is "fighting both decisions in court." Once again, Firestone and Wolston hold that such activity does not render one a public figure. In Steaks Unlimited, Inc. v. Deaner, 623 F. 2d 264, 267, 273-74 (3rd Cir. 1980), the plaintiff voluntarily undertook a "media publicity blitz" inorder to influence the public with respect to its views. In this case, it is obvious that none of the individual plaintiffs engaged in any such activity. It is equally clear that Mission, the corporate plainiff, by using the mails to solicit orders for its products, is not thereby voluntarily undertaking a "media publicity

blitz". In fact, Mission, the corporate plaintiff, did not even use the media. Moreover, if this court were to hold Mission, the corporate plaintiff, to be a public figure simply because it used the mails to sell a product, it would thereby expose every organization in the nation which used the mails to sell its products to the automatic classification of public figure. This "subject matter" classification is explicitly forbidden by the Supreme Court. Firestone and Wolston, supra.

In summary, it is abundantly clear that plaintiffs have not literally or figuratively "mounted a rostrum" in order to engage the attention of the public with a view towards resolution of a "controversy".

It is equally evident that the imagined "long running religious controversy" posed by the lower Courts does not pass muster of the Supreme Court decisions. Even assuming arguendo, that each plaintiff voluntarily injected himself into the

discussions regarding the ordinations of several of plaintiffs in 1971 (which plaintiffs do not concede to have been done), it is beyond question that if this was a controversy, it is long since reverted to a situation which is merely "newsworthy" and does not therefore constitute a continuing controversy within the definition of Wolston. Proof of this fact is supplied by defendant's own publicity appendix. While the appendix includes almost 200 articles which were written prior to 1974, in the last thirteen years, the attention of the public has not been focussed on this matter, as demonstrated by the dearth of publicity in the appendix. Moreover, since 1974, none of plaintiffs has ever sought or initiated any publicity whatsoever with respect to this or any other matter. Clearly therefore, the holding of Wolston is applicable herein, because plaintiffs have "succeeded for the most part in returning to...private life." Wolston, supra. at 153. It can be credibly argued that

for the last thirteen years, plaintiffs have assiduously avoided any involvement in any potential "public controversy", and by their refusal to so join, must be deemed not to have engaged the attention of the public as a matter of law for purposes of disposition of this summary judgment motion.

Courts must exercise care in deciding what is a public controversy. Newsworthiness alone will not suffice, for the alleged defamation indicates that someone in the press believes that matter deserves media coverage. Waldbaum v. Fairchild Pub., supra., at 1296. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. The Supreme Court has made clear that essential private concerns or disagreements do not become public controversy simply because they attract attention. Id.

From the foregoing analysis,

plaintiffs believe that it was highly inappropriate for the Court of Appeals to uphold as a matter of law that each of them is a public figure for each defamation alleged, solely on the basis of defendant's unfathomably vague allegations of religious and business controversy which have supposedly been ongoing for the past fifteen or twenty years. The facts clearly indicate otherwise. For the past thirteen years, plaintiffs have done nothing to engage the attention of the public in order to have a major impact on the resolution of any dispute, let alone a public controversy.

If for no other reason this Court should grant the petition so as once and for all clear up the misunderstandings and confusion caused by the Anderson v. Liberty Lobby decision. The conclusory nature of the findings of the lower court and the contradictory findings of the Appeals Court concerning the same subject matter are at total odds. For example, "The district court

determined that appellants had not thrust themselves into the forefront of the controvery surrounding the investigation of their business activities, since they had not utilized the media to further their point of view and try to sway public opinion" (Court of Appeals decision). Contrasted with " These activities in themselves may warrant treating appellants as limited purpose public figures with respect to the business controversy" (Following paragraph of ibid.)

Also similarly, in the next paragraph, the court of appeals writes "Appellants also argue that the district court failed to make specific findings with respect to public figure status of the individual priests and that it was improper for the court merely to equate the priests with Contemporary Mission (the corporate plaintiff). While more specific findings with respect to each individual appellant may have been desirable, we see no reversible error in the district court's holding." We submit that

more than being "desirable", it is dictated by the Supreme Court that each plaintiff must be treated individually in considering limited purpose public figure.

See also in the same paragraph "There is sufficient undisputed evidence in the record to establish that each of the priests participated in efforts to gain media attention for Contemporary Mission and that the member priests in the early seventies and that each bore responsibility for the business activities of Contemporary Mission." (Court of Appeals Decision) Contrast that statement with the lower court's finding "It is true that Contemporary Mission (the corporate plaintiff) and its members did not seek the attention of the IRS, the Postal Service or the Connecticut Department of Consumer Protection. They did not thrust themselves voluntarily into the investigation of their activities and in marked contrast to their actions in the religious controversy,they have not utilized the media

to further their points of view or to attempt to sway public opinion."

Perhaps another example to illustrate the clear contradictions posed by the Anderson v. Liberty Lobby case can be shown by the totally conclusory and unclear determinations of "the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor". As opposed to "bearing in mind the actual quantum and quality of proof necessary to support liability", in relation to a key element of one of the libels, namely "Ordinations called forged". The lower court, namely Judge Broderick, ignored that libel in his decision totally. The court of appeals, when the issue was raised, addressed it, stating: "We agree (with plaintiffs) that the subhead somewhat mischaracterizes the controversy surrounding the ordination. However, we do not think that in context, the statement was defamatory." While the notes from the New York Times reporter to her

editor clearly state :The Mission priests, under canon law, are officially ordained, no matter whether documents were forged or not. Indeed, Judge Broderick found the fact that because the individual plaintiffs were priests, this religious "overlapping" caused the individual priests plaintiffs to become public figures with regard to the business dealings of the corporate plaintiff, which he had already stated had not thrust itself or themselves voluntarily into any business controversy.

This Court should address itself to this case and grant the petition because this is precisely one of those messy situations that Justice Brennan spoke about in his dissent on Anderson v. Liberty Lobby. It is also one of those situations that caused another Justice to be taken aback by the notion that one's reputation within his profession may be so freely and glibly libeled and that there is no meaningful case authority to convince one that the First

Amendment is designed to condone such loose muckraking. "We are all aware of the explosion of communications in general and investigative reportage in particular in this 'media' age. I among others, discern a distressing tendency for our free press to descend from discussion of public issues to destruction of private reputations. I believe that by putting some brake on that tendency, defamation liability under existing standards, not only does not impair, but fosters the type of discussions the First Amendment is most concerned to protect and I view a few high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by the media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards that are commensurate with that power."

The record below is replete with factual instances of evidence of actual malice. Yet following the Liberty Lobby

formula, the lower courts totally ignored such factual evidence. As a newspaper article, written at the time of the ordinations stating that Cardinal Carberry viewed the priests as validly ordained and that no one was being accused of forgeries. The reporter was shown this article and told it was a mistake to even infer that the priests had been charged with forgeries. Yet she went ahead and printed such a libel without any further checking and ignoring the printed article she had in hand. The lower courts ignored this information and concluded that summary judgment was appropriate because appellants had failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence.

Similarly, when it was shown by factual proof that the reporter had misquoted and deleted statements with respect to a consent agreement, Judge Broderick found that this aspect of the article was troubling.

Especially because the article could well be characterized as an "investigative article". And then he went on to state that as a practical matter, the statement as published is "substantially" true.

This, bearing in mind of the actual "quantum and quality of proof necessary to support liability" does not square with Section 611(f) of the Restatement of Torts: "It is necessary nothing be omitted or misplaced in the report in such a manner as to convey an erroneous impression to those who hear or read it." It is misleading as a matter of law to convey the erroneous impression individuals have been charged with fraud and theft, when in fact they were not even parties to administrative action, such as this consent decree.

Also, while weighing this "quantum", it seems inherently unfair and contradictory to refer to neutral reportage when it is admittedly an investigative article and few sources of any kind are identified. And when

three of the sources that are identified deny making the charges so supposedly neutrally reported.

Some of the worse fears enunciated in Justice Brennan's dissent in the "Liberty Lobby" case have come to fruition in this case. Specifically "that this new rule will transform what is meant to provide an expedited "summary procedure into a full blown paper trial on the merits". It is obvious that the New York Times reporters understood this procedure and after unsuccessfully trying to deny Father O'Reilly's right to represent himself in a Federal Court, proceded to characterize the plaintiffs individually and the corporate plaintiff as well as "bad people".

And if this Court reads the decisions of the lower court, and especially the Appeals court, it will notice all the language removed from the New York Times briefs and documents below characterizing Contemporary Mission and the individual

plaintiffs in the worst light possible as an explanation for a decision which is so contrary to the enuntiated Supreme Court decisions and conclusory at best.

CONCLUSION

To really understand and grasp exactly what has been done to the plaintiffs by defendant and then by the full blown paper trial and decisions, one might ponder the following passage from the "Fountainhead":

> My God, but I must be a failure! I never thought of myself as such a poor teacher. That you should have learned so little in two years of close association with me! It's really discouraging. Since you are the most intelligent woman I know, the fault must be mine. Well, let's see, you did learn one thing: that I don't waste my time. Quite correct. I don't. Right, my dear, everything will be forgotten by next Christmas. And that, you see will be the achievement. You can fight a live issue. You can't fight a dead one. Dead issues, like all dead things, don't just vanish, but leave some decomposing matter behind. A most unpleasant thing to carry on your name. Mr. Hopton Stoddard will be thoroughly forgotten. The Temple will be forgotten. The lawsuit will be forgotten. But here's what will remain: 'Howard Roark? Why, how could you trust a man like that?

He's an enemy to religion. He's completely immoral. First thing you know he'll gyp you on your construction costs.' 'Roark? He's no good--why a client had to sue him because he made such a botch of a building.' 'Roark? Roark? Wait a moment, isn't that the guy who got into all the papers over some sort of mess? Now what was it? Some rotten kind of scandal, the owner of the building--I think the place was a disorderly house--anyway, the owner had to sue him. You don't want to get involved with a notorious character like that. What for, when there are so many decent architects to choose from?' Fight that, my dear. Tell me a way to fight it."

The character who spoke these words was a newspaper reporter.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 13, 1988

APPENDIX A

FOR THE SECOND CIRCUIT

No. 574—August Term 1987

Argued: January 21, 1988 Decided: March 16, 1988

Docket No. 87-7666

CONTEMPORARY MISSION, INC., REVEREND PATRICK J. BERKERY, REVEREND ROBERT J. CASSIDY, REVEREND JOHN F. COYNE, and REVEREND JOHN T. O'REILLY,

Plaintiffs-Appellants,

—against—

THE NEW YORK TIMES COMPANY,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge*,
TIMBERS and KEARSE, *Circuit Judges*.

Appeal by Contemporary Mission, Inc., and four of its member priests from judgment of the United States District Court for the Southern District of New York, Vincent L. Broderick, J., dismissing, on motion by The New York Times Company for summary judgment, a defamation action against the newspaper arising from a November 1,

1980 article entitled "Westport Priests Beset by Church and U.S. on Status."

Affirmed.

FR. JOHN T. O'REILLY, pro se, Guilford, CT (Kenneth R. Davis, William D. O'Reilly, of Counsel), *for Plaintiffs-Appellants.*

JOHN G. KOELTL, New York, NY (Debevoise & Plimpton, James G. Goodale, Edwin G. Schallert, of Counsel), *for Defendant-Appellee.*

FEINBERG, *Chief Judge*:

Contemporary Mission, Inc., a not-for-profit organization of Catholic priests with its principal place of business in Connecticut, and four of its member priests—Father Patrick J. Berkery, Father Robert J. Cassidy, Father John F. Coyne and Father John T. O'Reilly (collectively, the priests)—appeal from a judgment of the United States District Court for the Southern District of New York, Vincent L. Broderick, J., dismissing, on motion by The New York Times Company (the Times) for summary judgment, appellants' defamation action against the Times. That action was based upon an article in the November 1, 1980 edition of *The New York Times* (the *Times*) entitled "Westport Priests Beset by Church and U.S. on Status" (the article). For the reasons given below, we affirm the judgment of the district court.

I. Background

The underlying facts of this case, which are described in greater detail in Judge Broderick's thorough opinion reported at 665 F. Supp. 248 (S.D.N.Y. 1987), can be summarized as follows. On November 1, 1980, the *Times* published an article, written by *Times* reporter Diane Henry, which described certain religious and business controversies involving Contemporary Mission and its member priests. The article stated that the priests, who were living in Westport, Connecticut, "with all the trappings of wealth," had until recently been "supporting themselves with a large tax-exempt mail-order business" offering various self-improvement products. The article stated that the priests' religious status was being challenged by officials of their own church and by several governmental agencies. It addressed, among other things, (1) recent challenges by the Internal Revenue Service, the United States Postal Service and the State of Connecticut to Contemporary Mission's mail-order business; (2) allegations made nearly a decade earlier that documents submitted by three of the priests in support of their 1971 ordinations had been forged; and (3) questions concerning the priests' current religious status.

Shortly after publication of the article, appellants brought this diversity action seeking $20 million in damages. After a series of amendments to their complaint, appellants ultimately challenged the following 14 statements in the *Times* article as libelous (the quoted language is taken verbatim from the second amended complaint):

> 1. Church officials in St. Louis, led by John Cardinal Carberry, accused the Priests [of the Mission] of forging documents for their ordinations.

2. In a recent interview, Msgr. Andrew T. Cusack, an official with the Bridgeport (Ct.) Diocese, which now has jurisdiction over the mission (sic) priests, said they were 'inactive' and 'seeking reconciliation.' In a letter to the Government, he also said they were not recognized by the diocese and were 'unable to function as Catholic priests.' But the Postal Service says it has another letter, allegedly sent by the monsignor, that says 'their ordination and current canonical efforts have the full recognition of the church.' The monsignor has denied writing that letter.

3. But in 1977, the State of Connecticut got a cease and desist order against them for failing to deliver merchandise.

4. Ordinations Called Forged.[1]

5. The group's activities prompted some church officials to call them clerical dilettantes, and Cardinal Carberry refused to ordain them. Father Berkery had already been ordained, and the others were ordained in 1971 in Connecticut by a visiting Bishop from Ghana.

But that same year the Bishop, the Most Rev. Peter K. Sarphong (sic) later wrote to the Vatican saying he had been 'misled' when he accepted documents supporting the ordinations of the priests, which St. Louis officials said had been forged.

The mission priests disclaimed knowledge of the forged documents, and they accused Cardinal Carberry, who is now retired, of conducting a smear campaign against them.

1 This phrase appeared as a subhead in the text of the article.

Since then the priests have been in a kind of canonical limbo, and it is difficult to clearly determine their status.

6. In a separate action, the Postal Service charged them with fraud in the bath-oil sales.

7. As evidence of the honesty of their operation, the priests point to a Federal report saying the United States Attorney's office in Connecticut had declined, in January 1979, to prosecute charges of mail fraud against them because "the firm does supply the products in most instances."

8. Father O'Reilly later married the lead singer in the touring company and is now divorcing her.

9. Under normal circumstances, Father O'Reilly's marriage would mean his automatic excommunication from the church, according to experts on canon law. But Father O'Reilly said he had switched to the Eastern Rite of the Catholic Church, which allows married priests.

10. Five Roman Catholic priests whose religious status is being challenged by officials of their own church, as well as by three Federal agencies, say they have been misunderstood and harassed because they are unconventional clerics.

11. The priests, who insist they are not rich, argue that there is no law prohibiting churches from running a mail order house, that they run an honest business and have used the money to finance their work. Yet the Mission's vast public court record with the Government, individuals and corporations raises questions about whether the priests may have cloaked

a profitable business in the guise of a religious, tax-exempt organization.

12. The priests say that Mission is a pious society and that its members perform all traditional priestly functions and good works, but other priests contradict them.

13. In St. Louis a decade ago, the seminarians dreamed of using profits from their musical talents to support their labors for the poor.

14. Father O'Reilly and Father Berkery said they had conducted many services at St. Catherine's Church in Greenwich, but the pastor of the church, the Rev. Vincent J. O'Connor, contradicted them.

The allegations made by appellants with respect to these statements are discussed below.

In July 1987, Judge Broderick ruled on various motions pending before him. He denied the Times' motion to dismiss new claims in the second amended complaint on statute of limitations grounds, holding that adequate notice had been given by appellants' original complaint so that the second amended complaint related back to the time of the commencement of the action. The judge also denied appellants' request for additional discovery pursuant to Fed. R. Civ. P. 56(f). Addressing the merits of the Times' summary judgment motion, the court determined that statements 2 (in part), 3, 6, 7, 8, 9 and 13 were either not defamatory or not false or both. The Judge also held that appellants were limited purpose public figures with respect to the religious and business controversies described in the article and therefore appellants could not recover unless there is "clear and convincing proof" that the article was published "with knowledge of its falsity or with reckless

disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Judge Broderick granted the Times' motion for summary judgment as to all of appellants' claims and dismissed the complaint. The judge concluded that appellants had "not offered a scintilla of evidence to satisfy their burden of proving that the Times *knew* that the statements it published were false. . . . Plaintiffs have simply not shown that the Times 'entertained serious doubts about the veracity of the publication,' or that there were signs which should have tipped the Times off to any blatant inaccuracies in the article." 665 F. Supp. at 270 (emphasis in original). This appeal followed.

II. Discussion

A. *Appellants' Status as Limited Purpose Public Figures*

We must first consider whether Judge Broderick correctly determined that appellants were limited purpose public figures with respect to the challenged statements. Appellants' status as public or private figures determines the standard of fault that appellants must establish to succeed on their claims. In New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), the Supreme Court held that a state cannot award damages to a "public official" for defamatory statements concerning his official conduct absent a showing that the statements were published with "actual malice." This standard was extended to "public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-63 (1967) (Warren, C.J., concurring), and in Gertz, 418 U.S. at 352, the Court indicated that parties who are not public figures for all purposes may still be public figures with respect to a particular controversy. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) five members of the Supreme Court (in three sepa-

rate opinions) indicated that to apply the "actual malice" standard under *Gertz* a court must also determine that the contested statement is a matter of public concern.

In *Gertz*, the Court determined that the Plaintiff there, a lawyer tangentially involved in the prosecution of a policeman, was not a limited purpose public figure in connection with the controversy surrounding the prosecution because he had not "thrust himself into the vortex of [a] public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. at 352. In subsequent cases, the Supreme Court has held that (1) the fact that a wealthy woman sought to obtain a divorce did not make her a limited purpose public figure, Time Inc. v. Firestone, 424 U. S. 448, 454-55 (1976); (2) refusal to appear before a grand jury in a case likely to attract publicity did not make one a limited purpose public figure, Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157 (1979); and (3) receipt of Senator Proxmire's Golden Fleece Award by the recipient of federal research funds did not make the recipient a limited purpose public figure, Hutchinson v. Proxmire, 443 U.S. 111 (1979). The key inquiry in each case concerned "the nature and extent of [the] individual's participation in the particular controversy giving rise to the defamation." Gertz, 418 U.S. at 352; Wolston, 443 U.S. at 167.

In Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 136-37 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985), this court set forth a four part test for determining whether someone is a limited purpose public figure:

> A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation: (2) voluntarily injected himself

into a public controversy related to the subject of the litigation, (3) assumed a position of prominence in the public controversy; and (4) maintained regular and convincing access to the media.

Applying that test to the facts in *Lerman*, we determined that a well-known author whose books and screenplays dealt extensively with issues of sexual mores was a public figure for the limited purpose of commenting on sex and nudity in films. Id. at 137.

In this case, Judge Broderick determined that appellants had not achieved the "pervasive fame or notoriety" necessary to be characterized as general purpose public figures. 665 F. Supp. at 263-64. He concluded, however, that the appellants had become limited purpose public figures with respect to the subject matter of the challenged statements. Judge Broderick divided the statements into two broad categories: (1) those dealing with the religious controversy surrounding the priests' ordinations and their status as priests; and (2) those dealing with the business controversy surrounding Contemporary Mission's mail-order business. The judge concluded that appellants may properly be characterized as limited purpose public figures with respect to both the religious and business controversies. We agree.

Appellants were plainly limited purpose public figures with respect to the religious controversy surrounding them in the early 1970's. The record contains undisputed evidence that the priests voluntarily injected themselves into the public controversy surrounding the 1971 ordinations. Appellants openly invited media attention during this period of their careers. In the late 1960's, several members of Contemporary Mission formed a nationally known folk-rock group called The Mission Singers. The group pro-

duced 18 record albums, gave more than 200 concerts in over 38 states and appeared on numerous television and radio shows, including television shows such as the Ed Sullivan Show, the Mike Douglas Show and the Joey Bishop Show. "Virgin," a rock-opera written by Father O'Reilly, sold 20,000 copies. Appellants also published a syndicated column in over 50 newspapers for two years and published numerous books and articles on contemporary religious life. In 1968, when appellants left the Montfort Fathers in St. Louis in a dispute over instruction at the seminary, their departure was "publicized by nationwide and worldwide news wire services" because, according to Contemporary Mission, of "the fame and popularity" of the group's musical efforts.

When appellants left the Montfort Fathers, Father Cassidy, Father Coyne and Father O'Reilly had not yet been ordained, and over the next three years they contacted approximately 30 bishops seeking one who would ordain them. In 1971, Bishop Peter Sarpong of Ghana ordained the three priests in Cromwell, Connecticut. The ordinations attracted substantial media attention, which was intensified when the *St. Louis Review*, an Archdiocesan newspaper, published allegations that documents submitted in support of the ordinations had been forged. Allegations by church officials in St. Louis, where the priests then resided, and counter-allegations by the priests were widely reported by the press. Over 200 news articles about appellants from more than 60 different publications located in over 15 different states, a substantial portion of which addressed the controversy surrounding the ordinations, were submitted to the district court by the Times as part of its summary judgment motion.

Appellants openly availed themselves of the media, issuing press releases, making public statements and address-

ing "open letters" to Cardinal Carberry of St. Louis. Portions of an open letter addressed to Cardinal Carberry dated August 3, 1971, illustrate the public nature of the controversy:

> Thank you for doing so much recently for us members of the Contemporary Mission. Thanks to you, we have now become celebrities, almost household words. All the publicity you've given us—free of charge!—has helped our group immensely. We've been on so many radio talk shows, we've done so many television interviews in depth, that we can no longer keep track of it all. . . .
>
> We would also like to thank you for the thousands of dollars of free publicity you gave us in three issues of your house organ, the St. Louis Review. . . .
>
> Your little hoax about the allegedly forged letters was priceless. You attempted to implicate us in the forgery, but let's be honest: it seems more probable that *you* either fabricated those letters or else intimidated the authors enough so they would deny them. Why you? Because *we* couldn't have been responsible. You apparently know this well, as you haven't charged us with a thing. Instead, you use the old trick of planting the letters and then innocently letting people draw their own conclusions. Except you forget that the average person is too sophisticated not to spot a frame-up.

Appellants argue that even if the publicity accompanying the ordinations constituted a public controversy into which each appellant voluntarily injected himself in the early 1970's, the matter is no longer a continuing public controversy. They stress that there has been a dearth of

publicity concerning this matter in recent years and allege that since 1974 none of the appellants has sought or initiated any publicity with respect to this or any other matter. The district court found that there have been no media appearances by any members of Contemporary Mission since 1974 and The Mission Singers are no longer active. 665 F. Supp. at 253.

Appellants argue that they have "succeeded for the most part in returning to . . . private life." Wolston, 443 U.S. at 163. This assertion is largely belied by the fact they continued to thrust themselves into the public eye through the conduct of Contemporary Mission's business activities and have been involved in at least 35 other lawsuits since 1974, including several before this court, see, e.g., Contemporary Mission, Inc. v. Bonded Mailings, Inc., 671 F.2d 81 (2d Cir. 1982); Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97 (2d Cir. 1981); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918 (2d Cir. 1977); Robert Stigwood Group Ltd. v. O'Reilly, 530 F.2d 1096 (2d Cir.), cert. denied, 429 U.S. 848 (1976). Moreover, in *Wolston*, the Supreme Court explicitly reserved the question of "whether or when an individual who was once a public figure may lose that status by the passage of time." 443 U.S. at 166 n.7.

This court has previously indicated that the passage of time will not necessarily change an individual's status as a public figure. In Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the children of Julius and Ethel Rosenberg were found to be general purpose public figures because they were "cast into the limelight" during the Rosenberg trial. The court assumed, *sub silentio*, that the children's status as public figures continued some 20 years after the trial for the pur-

pose of a libel action based upon a book published in 1973 containing commentary on the Rosenberg trial. Similarly, in a case preceding *New York Times* and *Gertz*, this court held that a child prodigy who was once a public figure remained a public figure years later even though he had since "cloaked himself in obscurity," because "his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern." Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940). Other courts have concluded that an individual who becomes a limited purpose public figure with respect to a particular controversy retains that status for the purpose of later commentary on *that* controversy. See Street v. National Broadcasting Co., 645 F.2d 1227, 1235-36 (6th Cir.), cert. granted, 454 U.S. 815, cert. dismissed, 454 U.S. 1095 (1981); Holt v. Cox Enterprises, 590 F. Supp. 408 (N.D. Ga. 1984). Cf. Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1256-57 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981) (involving a general purpose public figure).

The public figure doctrine is based upon "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." New York Times, 376 U.S. at 270. This commitment is balanced against the state interest in compensating private individuals for wrongful injury to reputation. In *Gertz*, the Supreme Court declined to extend the *New York Times* standard to defamation actions brought by private individuals. The Court's rationale for distinguishing between private and public figures was twofold. First, the Court noted that private figures are more vulnerable to injury from defamation, since public figures have greater access to the media and thus are in a better position

to contradict a lie or correct an error. 418 U.S. at 344. Second, and more important, public figures generally "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Id. at 345. Applying this rationale, we conclude that appellants' limited purpose public figure status has not dissolved with the passage of time. While appellants' access to the media may have declined somewhat with time, they invited public attention and comment by thrusting themselves into the forefront of the religious controversy and thereby accepted the risk of increased exposure to defamatory falsehoods. We see no reason why, in this case, the media's treatment of the religious controversy should be subject to a different standard in 1980.

The district court determined that appellants had not thrust themselves into the forefront of the controversy surrounding the investigation of their business activities, since they had not utilized the media to further their points of view or to sway public opinion on this matter. Nonetheless, the district court held, and we agree, that the business controversy was necessarily intertwined with the religious controversy and that therefore appellants are also properly treated as limited purpose public figures with respect to the statements concerning their business activities contained in the article. The *Times* article examined the priests' business activities as part of a broader examination of the priests' religious status. As the district court stated, "the focus of the article is on the [appellants] as priests. . . . [T]he thrust of the story was that a group of priests, with a somewhat unusual history, had encountered challenges by the government." 665 F. Supp. at 267. Thus, the priests' public figure status with respect to the religious controversy emcompasses their business activities.

Moreover, appellants have not been shy in seeking public attention through their business activities. Between 1976 and 1980, Contemporary Mission sent out over 12 million solicitations for its various mail-order products. The products themselves—such as, "The 'Living' Cross," "The Edgar Cayce Handbook for Health Through Drugless Therapy," "Young & Firm Reducing Bath," and the "Guaranteed Tax Plan 1977"—by their very nature were certain to attract a degree of public attention. Appellants' business activities also brought Contemporary Mission under the scrutiny of several state and federal governmental agencies, which received hundreds of complaints about Contemporary Mission, and, as indicated above, Contemporary Mission has been involved in numerous lawsuits concerning its mail-order business. When the Postal Service took steps to revoke Contemporary Mission's nonprofit mailing permit in 1979, Contemporary Mission sought $1 million from the Postal Service for alleged violations of its constitutional rights. This court affirmed the grant of summary judgment dismissing the action, stating that Contemporary Mission's claims were "specious" and intended to "intimidate postal officials." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d at 106-07. These activities in themselves may warrant treating appellants as limited purpose public figures with respect to the business controversy. See National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98, 101 (4th Cir.), cert. denied, 464 U.S. 830 (1983); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273-74 (3d Cir. 1980).

Appellants also argue that the district court failed to make specific findings with respect to the public figure status of each of the individual priests and that it was improper for the court merely to equate the priests with

Contemporary Mission. While more specific findings with respect to each individual appellant may have been desirable, we see no reversible error in the district court's holding. There is sufficient undisputed evidence in the record to establish that each of the priests participated in efforts to gain media attention for Contemporary Mission and the member priests in the early 1970's and that each bore responsibility for the business activities of Contemporary Mission. The priests are the sole officers and directors of Contemporary Mission and have been members of Contemporary Mission since its incorporation in 1968.

B. *Insufficient Evidence of Actual Malice*

In order to succeed on their claims, appellants, as limited purpose public figures, must establish by clear and convincing evidence that the Times published the article with actual malice, "that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 280. "[T]here is a significant difference between proof of actual malice and mere proof of falsity." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984). Liability requires clear and convincing evidence of a *knowing* falsehood or "subjective awareness of probable falsity." Gertz, 418 U.S. at 335 n.6. As we observed in Herbert v. Lando, 781 F.2d 298 (2d Cir.), cert. denied, 106 S.Ct. 2916 (1986):

> [A] finding of actual malice cannot be predicated merely on a charge that a reasonable publisher would have further investigated before publishing. . . . Rather, a public figure defamation plaintiff must show either that the publisher actually entertained serious doubts about the veracity of the publication,

or that there are "*obvious* reasons to doubt the veracity of the informant or the accuracy of his reports."

781 F.2d at 308 (emphasis in original), quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968). Appellants also have the burden of proving falsity, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) ("a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation"), although, as a practical matter, evidence sufficient to establish actual malice will generally encompass evidence of falsity. Id. at 778. Thus, appellants have a "heavy burden of proof," Lando, 781 F.2d at 308, a burden that is designed "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." Gertz, 418 U.S. at 342, citing NAACP v. Button, 371 U.S. 415, 433 (1963).

Judge Broderick concluded that summary judgment was appropriate in this case because appellants had failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence. We agree. Summary judgment is appropriate in a defamation action, as in other actions, where there are no unresolved factual disputes as to issues material to the outcome of the litigation. See generally Knight v. U.S. Fire Insurance Co., 804 F.2d 9, 11 (2d Cir. 1986) cert. denied, 107 S. Ct. 1570 (1987). Moreover, where the factual dispute concerns whether a publisher acted with actual malice, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2514 (1986). The Court in *Liberty Lobby* reasoned that

"in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden," id. at 2513, namely, the "clear and convincing evidence" standard. The Court discounted the argument also made here that "the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue," stressing that a plaintiff opposing a fully supported motion must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Id. at 2514. It is not enough for the plaintiff merely to assert "that the jury might, and legally could, disbelieve the defendant's denial . . . of legal malice." Id. Cf. Markowitz v. Republic National Bank of New York, 651 F.2d 825, 828 (2d Cir. 1981) ("Some facts must be asserted to support the claim that the state of mind existed.")

Appellants argue that they have not been provided a full opportunity to discover all the information that is essential to their opposition to the Times' motion for summary judgment. Fed. R. Civ. P. 56(f). However, appellants conducted extensive discovery below. The Times produced a huge volume of documents, including Ms. Henry's research file and her notes from certain conversations related to the article. Appellants conducted depositions of Ms. Henry for eight days and of several *Times* editors. Appellants argue that they were denied an opportunity to depose Ms. Henry's husband, who at the time of the article was the deputy metropolitan editor at the Times. The district court denied appellants' request for additional discovery pursuant to Rule 56(f), based in part upon its determination thar Ms. Henry's husband had nothing to do with the editing of the article. Appellants were given reasonable access to Ms. Henry and other *Times*

employees, and the district court was well within its discretion in denying appellants' request for additional discovery under Rule 56(f).

On appeal, this court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " Bose Corp., 466 U.S. at 499, quoting New York Times, 376 U.S. at 285. Our independent review of the record reveals no indication of clear and convincing evidence that the Times acted with actual malice.

1. *Overall Impact of the Article*

The district court noted that while appellants do not explicitly plead a separate cause of action based upon the overall impact of the article, such a theory pervades their arguments. We agree with Judge Broderick that to the extent that appellants do raise arguments based upon the article's overall impact, such arguments are encompassed by their challenge to the individual statements, which cover a substantial portion of the article. Cf. Lando, 781 F.2d at 307-08 (holding that the defamatory implications of the specific statements at issue and the overall impact of the publications at issue were identical). Moreover, as Judge Broderick observed, the article does present appellants' position with respect to the various controversies, 665 F. Supp at 271, and thus cannot be said to be completely one-sided. The article indicates that appellants (1) disclaim knowledge of the forged documents; (2) claim to have conducted thousands of masses, weddings, funerals and other services over the past several years; and (3) contend that they run an honest business, are not rich and have used their profits to finance their work. Compare Cianci v. New Times Publishing Co., 639 F.2d 54, 69 (2d Cir. 1980)

(constitutional privilege of neutral reportage unavailable where article failed to report, among other things, appellant's claim of innocence to rape charge).

The *Times*' investigation "taken as a whole . . . was sufficiently thorough and professional when held up to the daunting standards of actual malice." Tavoulareas v. Piro, 817 F.2d 762, 797 (D.C. Cir.) (in banc), cert. denied, 108 S. Ct. 200 (1987). The record indicates that (1) Ms. Henry researched the article over a two-month period, interviewing more than 70 persons, including three of the appellants and their counsel, and reviewed voluminous court records and clippings about appellants; (2) the article was edited by the *Times*' Regional and Deputy Regional Editors, who together had over 30 years experience as journalists; and (3) the article was reviewed by the *Times*' Religion Editor and by an attorney in the *Times*' legal department due to Contemporary Mission's litigiousness.

Appellants assert that Ms. Henry and the Times intentionally distorted and manipulated the truth in order to blacken appellants' reputations. Such bare assertions of ill will are not sufficient to establish a triable issue of actual malice. See Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 281-82 (1974); Tavoulareas, 817 F.2d at 795. Appellants must come forward with sufficient facts to enable a jury to find by clear and convincing evidence that the Times, or Ms. Henry in particular, acted with malice in the constitutional sense, i.e., with knowledge that the statements made were false or with reckless disregard of the truth. The following review of appellants' allegations with respect to each of the challenged statements indicates that appellants have failed to meet this burden.

2. *Statements Dealing with the Business Controversy*

Appellants allege that Ms. Henry was "obsessed" with the idea that Contemporary Mission was not running an "honest business" and that therefore she ignored contrary evidence and knowingly misstated facts concerning the business controversy. While, as Judge Broderick observed, Ms. Henry may have been sloppy in places in her writing, there is nothing to suggest that she entertained serious doubts about the truth of the challenged statements.

In Part I of this opinion at pp. 4-5, we have listed each of the statements that were the basis of appellants' complaint, and the reader is referred to them for convenience. Appellants challenge statement 3, claiming that it misstates the terms of the cease and desist order, which in fact provided that "Respondent shall . . . (b) Cease and desist the practice of accepting mail orders and payments for its merchandise and then failing to deliver either the ordered merchandise or refunds *within a reasonable period of time.*" (emphasis added). Ms. Henry did not repeat the phrase "within a reasonable period of time." In the papers before the district court, Ms. Henry swore that she had spoken with the Connecticut Department of Consumer Protection (the CDCP), which had indicated that the State of Connecticut had taken action against Contemporary Mission, in part, because of its failure to deliver merchandise. She also notes that a press release issued by the CDCP describing the administrative complaint against Contemporary Mission, which contained language substantially similar to that contained in the cease and desist order, did not include the phrase "within a reasonable period of time." At most, Ms. Henry may have been careless in failing to accurately report the terms of the cease and desist order. However, there is nothing in the record to

suggest that she recklessly disregarded the true content of the order. The statement "represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." Bose Corp., 466 U.S. at 513. Cf. Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977) (in invoking the privilege for neutral reportage, "[l]iteral accuracy is not a prerequisite").

Appellants also argue that statement 3 is libelous in that the cease and desist order was not "got . . . against them," but rather resulted from a negotiated consent agreement and involved only Contemporary Mission and not the individual priests. They challenge statement 6, claiming that the Postal Service allegation was not made against the individual priests but rather against Contemporary Mission, and statement 7, claiming that the United States Attorney's office never considered prosecuting charges of mail fraud against the individual priests, although they apparently do not dispute that such charges were considered against Contemporary Mission. These discrepancies are so slight as to belie any suggestion of actual malice. A CDCP administrative complaint was brought against Contemporary Mission, even if the later cease and desist order was entered on consent. And, while Contemporary Mission is distinguishable from the individual priests, as Judge Broderick determined, "it is . . . undeniably true that the individual [priests] controlled Contemporary Mission, Inc., determined its policies and were responsible for its actions, and that Contemporary Mission acted only through them." 665 F. Supp. at 259.

With respect to statement 10, appellants argue that the priests' religious status was not being challenged by three federal agencies. They do not dispute that Contemporary

Mission's mail order business had been scrutinized by various governmental agencies and that the Internal Revenue Service had revoked its tax-exempt status. Moreover, in this context, Contemporary Mission's business status and religious status were intertwined. Again, while it was Contemporary Mission's status and not the priests' status that was being challenged, the First Amendment does not require such precision. There is no indication that Ms. Henry was reckless in her reporting various governmental challenges to the mail-order business; for the most part, her discussion of the business controversy appears to have been accurate and complete.

Appellants challenge statement 11, arguing that the statement conveys the false impression that they set up a religious organization in 1968 in order to cloak a profitable mail-order business which they began some eight years later. The Times, however, argues that no such "illogical understanding" was intended or conveyed, and we agree.

3. *Statements Dealing with the Religious Controversy*

Appellants challenge statement 1, claiming that "[c]hurch officials in St. Louis, led by John Cardinal Carberry," never accused the priests of forging documents for their ordinations. They state that they specifically informed Ms. Henry prior to publication of the article that no such accusation had been made and that a September 12, 1980 article in the *National Catholic Reporter* that reported the alleged accusations was false. Their point apparently was that the Archdiocese did not say who it believed forged the documents. Mere denials prior to publication, however, are insufficient to establish actual malice. As we stated in Edwards, 556 F.2d at 121:

> liability under the "clear and convincing proof" standard of *New York Times* v. *Sullivan* cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.

Moreover, the record indicates that Ms. Henry was fully justified in her belief that the accusations had indeed been made. Ms. Henry indicates that she reviewed several articles—including the *National Catholic Reporter* article and two *Times* articles from 1971—which discussed the accusations, as well as a written statement by Father Berkery acknowledging the accusations. A July 16, 1971 article in the *St. Louis Review*, an Archdiocesan newspaper, explicitly sets forth accusations by the purported authors of the documents that the documents were forged. In public statements made in the early 1970's, the priests themselves stated that they had been accused of forging documents and criticized Cardinal Carberry for causing such accusations to be printed in the *St. Louis Review*. See, e.g., the priests' open letter to Cardinal Carberry, dated August 3, 1971, quoted above.

Appellants allege that Ms. Henry was "obsessed" with the question of whether they were "real priests." They claim that the article mischaracterizes their canonical status and fails to convey the fact that they are fully ordained priests. Specifically, they challenge statement 4, the subhead "Ordinations Called Forged;" statement 5, stating that the priests "have been in a kind of canonical limbo;" and statement 10, stating that the priests' religious status is "being challenged" by officials of their own church.

While the subhead "Ordinations Called Forged" was apparently added by a copy editor just prior to publication, this in itself does not mean that the statement cannot be actionable. The *Times* is responsible for the content of its articles, whether the text is written by a reporter or added by a copy editor at a later stage. However, we do not think that, in context, the statement was defamatory. We agree that the subhead somewhat mischaracterizes the controversy surrounding the ordinations, since it was the documents supporting the ordinations and not the ordinations themselves that were called forged. But, the statement is immediately followed by text that clarifies that the priests were indeed ordained and that the allegations of forgery related to the documents submitted in support of the ordinations and not the ordinations themselves.

Similarly, in statement 5, the statement that the priests "have been in a kind of canonical limbo" cannot by itself support a finding of actual malice. As discussed above, Ms. Henry was justified in her belief that church officials had accused the priests of involvement with the forgery controversy surrounding the ordinations. The phrase "canonical limbo" is used in a colloquial way, and taken in this light, does not seem unfounded. Nowhere does the article state that the appellants are not ordained priests or suggest that efforts to defrock the priests have ever been initiated.

To the extent church officials raised questions concerning the forged documents, it could be said that in some sense church officials challenged the priests' religious status. A church newspaper said as much. The July 16, 1971 article in the St. Louis Review states that "[a] spokesman for the Archdiocese of St. Louis said that other letters in the documentation [concerning the ordinations] 'raised

more doubts about the status of the members of the Contemporary Mission under church law.' " Moreover, the assertion in statement 10 that church officials challenged the priests' religious status is essentially the same as other statements in the article. such as statement 12, which we discuss below.

Appellants also challenge statements attributed to various church officials related to their religious status. They challenge statement 2, claiming that Monsignor Cusack did not deny writing a letter to the Postal Service stating that the priests' "ordination and current canonical efforts have the full recognition of the church." Ms. Henry submitted contemporaneous notes to the district court purportedly reflecting a telephone conversation she had with Monsignor Cusack, in which he allegedly denied having written the letter. In response, appellants submitted a transcript of a November 13, 1980 telephone conversation between Father Berkery and Monsignor Cusack (apparently taped without the Monsignor's knowledge or permission) in which the Monsignor purportedly stated that he told Ms. Henry in their telephone conversation that he would not verify any letter "except that if I saw it." Appellants state that Monsignor Cusack declined to furnish an affidavit upon the advice of Diocesan counsel. Even if we make the assumption, however, that the transcript of the telephone conversation submitted by appellants is accurate and the further questionable assumption that such evidence is properly considered on the motion for summary judgment, see Beyah v. Coughlin, 789 F.2d 986, 989 (2d Cir. 1986), quoting 6 Moore's Federal Practice ¶ 56.22[1], at 56-1312 to 56-1316 (2d ed. 1985), ("[h]earsay testimony . . . that would not be admissible if testified to at the trial may not properly be set forth in [the Rule 56(e)] affida-

vit"), we do not believe it is sufficient to establish clear and convincing evidence of actual malice.

There is little in the record, beyond appellants' bare accusations, to suggest that Ms. Henry's investigation was pursued in bad faith. As noted above, the investigation on the whole appears to have been thorough and professional. There is no evidence that suggests that Ms. Henry knowingly or recklessly mischaracterized the Monsignor's statements in her contemporaneous notes of her telephone conversation with him. Accordingly, the statement in the article cannot be said to have been published with actual malice.

Appellants further challenge statement 2, claiming that the Bridgeport Diocese did not have jurisdiction over them. Apparently, Contemporary Mission's status was that of a religious society, and it was not associated with a specific diocese. Nonetheless, the Bridgeport Diocese did handle inquiries concerning Contemporary Mission, which was in the Diocese's geographic region. Appellants themselves apparently asked Monsignor Cusack to write to the Postal Service on their behalf.

Appellants challenge statement 5, claiming that church officials did not call them clerical dilettantes and that Cardinal Carberry did not refuse to ordain them, arguing that they never asked Cardinal Carberry to ordain them. Ms. Henry states that the phrase "clerical dilettantes" was based on a 1971 *Times* article (although the phrase was not explicitly attributed to church officials in the article) and that the statement "Cardinal Carberry refused to ordain them" was based on at least two other articles in her research file. Reliance on previously published articles is not always sufficient in itself to negate any possible finding of actual malice. Actual malice can be established if the re-

porter had "obvious reasons to doubt the veracity" of the articles. St. Amant, 390 U.S. at 732. Here, however, the statements in the articles upon which Ms. Henry relied are consistent with the other facts she uncovered and no specific evidence has been offered by appellants to establish that the reporter "entertained serious doubts" about their truth. Lando, 781 F.2d at 308.

Slimilarly, appellants' challenge to statement 12 must fail. Ms. Henry's research appears to provide ample support for the statement that "other priests" contradict "[t]he priests [who] say that the mission is a pious society and that its members perform all traditional priestly functions and good works." Ms. Henry apparently based this statement upon interviews with appellants, church officials and her review of documentary evidence and other newspaper articles. There is nothing in the record that suggests by clear and convincing evidence that she entertained serious doubts about the truth of the statement.

Appellants challenge statement 14 on the ground that Father O'Reilly and Father Berkery purportedly told Ms. Henry that they had "registered" baptisms in the records at St. Catherine's Church in Greenwich, Connecticut, not that they had "conducted" many services at the church. They stress that Ms. Henry concedes having lost her notes to the conversation in which Father O'Reilly and Father Berkery discussed their relationship with St. Catherine's. They apparently do not dispute, however, that Father O'Reilly and Father Berkery referred to Father O'Connor, the pastor of St. Catherine's church, to support their claims. Nor do they offer any evidence to dispute Ms. Henry's assertion that she did in fact speak with Father O'Connor, who denied having any connection with the priests. Even if Ms. Henry did misquote Father O'Reilly

and Father Berkery concerning their relationship with St. Catherine's, there is insufficient evidence to suggest that the statement was published with actual malice.

Appellants challenge several statements dealing with Father O'Reilly's religious status in particular. They challenge statement 8, claiming that Father O'Reilly did not attempt to divorce his wife, but rather that she divorced him. They challenge statement 9, claiming that there is no longer such a concept as "excommunication" within the Roman Catholic church and that since Father O'Reilly had switched to the Eastern Rite of the Catholic Church prior to his marriage, the question of excommunication would not have arisen. They challenge statement 10, claiming that the statement incorrectly states that the priests are all Roman Catholic priests, when in fact Father O'Reilly is an Eastern Rite Catholic priest. It is true that statements impugning the reputation of a clergyman should not be treated lightly. Here, however, the statements are substantially true. The article did not suggest that Father O'Reilly was excommunicated, but rather presented his own explanation that having switched to the Eastern Rite he was permitted to marry. Father O'Reilly concedes that he was once married and is now divorced and that he was once a Roman Catholic priest but is now an Eastern Rite Catholic priest. Whether or not Ms. Henry was technically correct in her description of canon law, she believed the statements were supported by her research and there is no indication that she had reason to doubt their veracity.

Finally, appellants challenge statement 13, claiming that the statement is defamatory because the priests did not merely "dream" of using profits from their musical talents to support their labors for the poor, but in fact did

use the profits for such purposes. Appellants do not claim that the statement is false; they merely argue that a more laudatory statement should have been used in its place. The argument comes close to being frivolous and merits little discussion. The statement was not defamatory.

In sum, the alleged innuendo in this and other statements in the article which appellants challenge cannot support a finding of actual malice. The mere fact that the *Times* article may have been somewhat aggressive and expressed a point of view in its presentation of the facts is not sufficient to establish clear and convincing evidence of actual malice.

III. Conclusion

We have determined that appellants are limited purpose public figures for the purpose of the statements in the article concerning the religious and business controversies, and that they have failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence. The judgment of the district court is therefore affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONTEMPORARY MISSION,INC.,et al.,	:	80 Civ. 6587
	:	(VLB)
Plaintiffs,	:	
-against-	:	
THE NEW YORK TIMES COMPANY,	:	
Defendant.	:	

VINCENT L. BRODERICK, U.S.D.J.

MEMORANDUM ORDER

I.

This defamation action arises from the publication in the November 1, 1980 edition of The New York Times of an article entitled "Westport Priests Beset by Church and U.S. on Status" (the "article"). The subjects of the article were the plaintiffs, Contemporary Mission, Inc. ("Contemporary Mission"), a not-for-profit organization of Catholic priests based in Westport, Connecticut, and four of its five member-priests.

In their original complaint, plaintiffs alleged diversity jurisdiction, challenged

three statements in the Times article as libelous, and asked for $20 million in damages. They amended their complaint two weeks thereafter to claim that a fourth statement in the Times article was libelous. Plaintiffs 18 months later sought and were granted permission to file a second amended complaint ("SAC") which added 10 additional claims of libel.

The allegedly defamatory article was written about Contemporary Mission and its priests by Times reporter Diane Henry. The article's principle content, and its thrust, have been succinctly summarized by Judge Friendly:

> The article said, inter alia, that church officials in St. Louis, led by John Cardinal Carberry, had accused the priests of forging documents for their ordinations; that Monsignor Cusack of Bridgeport, Conn. Diocese had written that the priests were not recognized by the diocese and were unable to function as Catholic priests; that in 1977 the State of Connecticut had gotten a cease and desist order against them for failing to deliver merchandise; that the Postal Service had charged them with fraud in the sale of bath-oil; that Father John O'Reilly had married, which would normally mean his excom-

> munication from the Roman Catholic Church, but that he said he had switched to the Eastern Rite of the Catholic Church which allows priests to marry; and that the Mission's public court record "raises questions about whether the priests may have cloaked a profitable business in the guise of a religious, tax-exempt organization." Plaintiffs allege that these and other statements are false or so incomplete as to convey a misleadingly false impression.

O'Reilly v. New York Times Co., 692 F. 2d 863 (2d Cir. 1982).

After a series of discovery motions and pretrial conferences, and prior to the filing of the second amended complaint, defendant The New York Times Company (the "Times") filed a motion for summary judgment which was addressed to the first amended complaint. Soon thereafter, one of the individual plaintiffs, Rev. John T. O'Reilly, applied to this court for leave to discharge his attorney and to proceed upro se. I denied the application. The Court of Appeals reversed. O'Reilly v. New York Times Co., 692 F. 2d 863 (2d Cir. 1982). Thereafter defendant renewed its motion for summary judgment, this time

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addressed to the second amended complaint. I denied plaintiffs' request for further discovery, except for that which plaintiffs could demonstrate a need pursuant to Fed. R. Civ. P. 56(f), and I denied plaintiff's motion to reargue this issue two weeks later. I subsequently held oral argument on the motion for summary judgment, and reserved decision.

II.

Contemporary Mission is a religious group which makes "religious communication [its] mission, apostolate and profession." The four individual plaintiffs are officers and directors of Contemporary Mission and have been members of Contemporary Mission since its incorporation in 1968.

In the late 1960's several members of Contemporary Mission became "nationally known folk-rock" group called "The Mission Singers". Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972). More recently, Contemporary Mission has

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operated a mail order business which has brought it into conflict with various government agencies.

A. Plaintiff's Religious Controversy

In 1968, the individual plaintiffs who had been associated with the Montfort Fathers in St. Louis, left the Montfort Fathers in a dispute over instruction at the seminary. A debate ensued as to whether the departure was voluntary. The St. Louis Archdiocese issued a news release stating the plaintiffs no longer represented the Montfort Fathers. This release was "publicized by nationwide and worldwide news wire services" as a result, according to Contemporary Mission, of "the fame and popularity" of the group stemming from its musical efforts.

When plaintiffs left the Montfort Fathers in 1968, three of them had not yet been ordained as Roman Catholic priests. Over the next three years, plaintiffs contacted approximately 10 bishops, seeking one who would ordain those three as priests. In May,

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1971, they were ordained in Cromwell, Connecticut by Bishop Peter Sarpong of Ghana. The ordination occasioned extensive controversy, including allegations and counter allegations by Church officials in St. Louis and by the plaintiffs, all of which were reported by the press.

The majority of the allegedly libelous statements in the November 1, 1980 Times article are related to this controversy, which intensified on July 16, 1971 when the St. Louis Review, an Archdiocesan newspaper, published several allegedly forged letters and a disputed transcript that the St. Louis Review stated had been submitted to Bishop Sarpong with respect to the plaintiffs' ordination. The plaintiffs then accused Cardinal Carberry of manipulating the Catholic press in St. Louis. An August 3, 1971 letter from the plaintiffs to Cardinal Carberry illustrates the public natures of the controversy: "[t]hanks to you, we have now become celebrities, almost household

words. All the publicity you've given us--free of charge!--has helped our group immensely. We've been on so many radio talk shows, we've done so many television interviews in depth, that we can no longer keep track of it all."

B. Plaintiffs' Artistic Careers

As noted, some of the members of Contemporary Mission had formed a musical group call The Mission Singers, which used music as a means of expressing religious beliefs. The Mission Singers made some 18 record albums and gave more than 200 concerts in over 38 states. One of the plaintiffs said that "[a]s the 'singing seminarians', the world has seen them on... every major and independent network."

Plaintiffs for two years published a syndicated column in over 50 newspapers. The individual plaintiffs have appeared on various network television programs and on local television and radio shows in many states. They have also published books and

articles on contemporary religious life. Robert Stigwood Group Ltd., 346 F. Supp. at 379. These television and radio appearances took place prior to 1974. Since the, there have been no media appearances by any member of Contemporary Mission, and The Mission Singers are no longer active.

C. Plaintiffs' Mail Order Business

Plaintiffs have in more recent years run a mail order business which has brought them into conflict with a variety of governmental agencies.

Between 1976 and 1980 plaintiffs dispatched over 12 million mail pieces with respect to, or offering, various "self-improvement" products.

Contemporary Mission's business practices have been investigated by the Bridgeport Better Business Bureau, the Westport Chamber of Commerce, and the Westport Police Department. In February, 1979, the Connecticut Department of Consumer Protection ("CDCP") issued an administrative complaint

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against Contemporary Mission charging that it had "accepted mail orders and payments for its merchandise and then failed to deliver either the ordered merchandise or refunds within a reasonable period of time." Contemporary Mission ultimately consented to a cease and desist order in which, while denying any wrongdoing, it agreed to cease the challenged practices.

In September, 1979 the Internal Revenue Service ("IRS") suspended Contemporary Mission's non-profit status. Several of the products which Contemporary Mission offered to the public have been removed from the market as a result of efforts by the Postal Service pursuant to 39 U>S>C> Section 3005, which forbids "obtaining money or property through the mail by means of false representations."

In 1979, Contemporary Mission sued the Postal Service, seeking $1 million from Postal Service officials for alleged violations of its constitutional rights. In

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June, 1980 the Postal Service revoked Contemporary Mission's non-profit mailing permit on the ground that "[i]t does not appear that the primary purpose of Contemporary Mission is religious."After a preliminary injunction was issued preventing sales of one of the products, Contemporary Mission agreed to discontinue permanently the promotional activities which were challenged. See Contemporary Mission, Inc. v. United States Postal Service, 648, F. 2d 97, 101 n.2 (2d Cir. 1981). Contemporary Mission's suit against the Postal Service was thereafter dismissed, and the Court of Appeals affirmed the dismissal.

III.

Plaintiffs have alleged in the second amended complaint that the following 14 statements in the article are libelous:

1. Church officials in St. Louis, led by John Cardinal Carberry, accused the priests [of the Mission] of forging documents for their ordinations. Par.9

2. In a recent interview, Msgr. Andrew E. Cusack, an official with the Bridgeport (Ct.) Diocese, which now has jurisdiction of the

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mission (sic) priests, said they were 'inactive' and 'seeking reconciliation.' In a letter to the Government, he also said they were not recognized by the diocese and were 'unable to function as Catholic priests.' But the Postal Service says it has another letter, allegedly sent by the monsignor, that says 'their ordination and current canonical efforts have the full recognition of the church.' The monsignor has denied writing that letter. Par. 11

3.But in 1977, the State of Connecticut got a cease and desist order against them for failing to deliver merchandise. Par. 13

4. Ordinations Called Forged Par. 15

5. The group's activities prompted some church officials to call them clerical dilettantes, and Cardinal Carberry refused to ordain them. Father Berkery had already been ordained and the others were ordained in 1971 in Connecticut by a visiting Bishop from Ghana.

But that same year, the Bishop, the Most Rev. Peter K. Sarphong [sic] later wrote to the Vatican saying he had been 'misled' when he accepted documents supporting the ordinations of the priests, which St. Louis officials said had been forged.

The mission priests disclaimed knowledge of the forged documents, and they accused Cardinal Carberry, who is now retired, of conducting a smear campaign against them.

Since then, the priests have been in a kind of canonical limbo, and it is difficult to clearly determine their status. Par. 17.

6. In a separate action, the Postal Service charged them with fraud in the bath-oil sales. Par. 19

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7. As evidence of the honesty of their operation, the priests point to a Federal report saying the United States saying the United States Attorney's office in Connecticut had declined in January 1979, to prosecute charges of mail fraud against them because "the firm does supply the products in most instances." Par. 21

8. Father O'Reilly later married the lead singer in the touring company and is now divorcing her. Par. 23

Under normal circumstances, Father O'Reilly's marriage would mean his automatic excommunication from the church, according to experts on canon law. But Father O'Reilly said he had switched to the Eastern Rite of the Catholic Church, which allows married priests. Par. 25.

10. Five Roman Catholic priests whose religious status is being challenged by officials of their own church, as well as by three Federal agencies, say they have been misunderstood and harassed because they are unconventional clerics. Para. 27.

11. The priests, who insist they are not rich, argue that there is no law prohibiting churches from running a mail order house, that they run an honest business and have used the money to finance their work. Yet the Mission's vast court record with the Government, individuals and corporations raises questions about whether the priests may have cloaked a profitable business in the guise of a religious, tax-exempt organization. Par. 29.

12. The priests say that the mission [sic] is a pious society and that its members perform all traditional priestly functions and good works, but other priests contradict them. Par. 31.

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13. In St. Louis a decade ago, the seminarians dreamed of using profits from their musical talents to support their labors for the poor. Par. 33.

14. Father O'Reilly and Father Berkery said they had conducted many services at St. Catherine's Church in Greenwich, but the pastor of the church, the Rev. Vincent J. O'Connor, contradicted them. Par. 35.

The allegedly libelous statements can be categorized as follows: (1) The Religious Controversy: statements 1, 2, 4, 5, 12, 13 and 14 deal exclusively with the religious controversy surrounding plaintiffs; (2) The Business Controversy: statements 3, 6, and 7 pertain solely to the business controversy surrounding plaintiffs; (3) Hybrid statements: statements 10 and 11 pertain to both the religious and the business controversy; and (4) UFather O'Reilly's marital status: statements 8 and 9 address the marital status of one of the individual plaintiffs.

lV.

Defendant in this libel action first seeks to dismiss the 10 allegations added by plaintiffs in their second amended complaint,

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on the ground that they are barred by the New York statute of limitations. See N.Y.C.P.L.R.; Sect. 215(3) (McKinney 1972). Plaintiffs argue that the "relation back" doctrine of Rule 15(c) of the Federal Rules of Civil Procedure permits the amendments that are in dispute.

In a June 23, 1982 hearing, I allowed plaintiffs to file a second amended complaint to their complaint but I did not specifically address the question of whether any or all of the 10 new claims in the proposed second amended complaint would be time-barred. IO now deny the defendant's motion to dismiss the second amended complaint on statute of limitations grounds, and for the reasons set forth below hold that adequate notice had been given so that plaintiff's second amended complaint relates back to the time of the commencement of the action.

"While state law must be applied in a diversity case to determine whether an action is barred by the statute of limitations,

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Guaranty Trust Co. v. York., 326 U.S. 99 (1945), most courts considering the issue have held that the federal rule as to relation back applies even in a diversity case, since the question of relation back of amendments to pleadings is properly a matter of practice and procedure and is specifically dealt with in the Federal Rules of Civil PRocedure." Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1093 (N.D.N.Y. 1977) (citations omitted);see also 6 Wright & Miller, Federal Practice and Procedure: Civil Sec. 1503 at 535 (1971). "In general, if a question is covered by a provision of the Federal Rules of Civil Procedure, the federal rule rather than state law ill control." Holdridge, 440 F. Supp. at 1093 n.2, citing Hanna v. Plumer, 380 U.S. 460 (1965). I therefore apply the federal rule as to the "relation back" issue.

Under Rule 15(c), an amendment relates back to the date of the original pleading whenever "the claim or defense asserted in

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the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." In deciding whether an amendment relates back, the principal inquiry is whether adequate notice has been given to the opposing party "by the general fact situation alleged in the original pleading." Rosenberg v. Martin, 478 F. 2d 520, 526 (2d Cir. 1973), cert denied, 414 U.S. 872 (1973) citing Snowqualmie Tribe v. United States, 372 F. 2d 951, 960 (Ct. Cl. 1967). See also Schiavone v. Fortune, 106 S. Ct. 2379, 2385 (1986) ("linchpin is notice" within limitations period). An amendment will not relate back if it sets forth a new set of operational facts. Holdridge, 440 F. Supp. at 1093). It can, however, make more specific what has already been alleged. Id.

Because there is only the November 1, 1980 article in question, there is only one "transaction or occurrence" giving rise to the complaint. Compare Jackson v. Ideal

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Publishing Co., 274 F. Supp. 318, 320 (E.D. Pa. 1967) (separate publication of a libelous statement found to be an "entirely different transaction" for amendment purposes); Jensen v. Times Mirror Co., 634 F. Supp. 304, 314-15 (D. Conn. 1986). While the 10 additional statements in the second amended complaint which are alleged to be libelous do not always involve the same set of facts as do the three (and then four)matters originally alleged to be libelous, there is a "common core of operative facts" in the amended and the second amended complaints. 6 Wright & Miller, Federal Practice and Procedure: Civil Sect. 1497 t 495 (1971). Thus in the first amended complaint plaintiffs alleged that a subheading in the article, "Ordinations called forged," was libelous; in the second amended complaint, plaintiffs alleged that the four paragraphs in the article describing the ordinations are also libelous. In the original complaint, plaintiffs alleged as libelous the first sentence in the eleventh

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paragraph of the article, to the effect that the "State of Connecticut got a cease and desist order against them for failing to deliver merchandise"; in the second amended complaint, plaintiffs allege that the sentence directly following, stating that "[i]n a separate action, the Postal Service charged them with fraud in the bath-oil sales," is also libelous.

That the November 1, 1980 article was a single transaction or occurrence is supported by the policy behind Rule 15. The critical inquiry under Rule 15 is whether the defendant "ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question." See Wright & Miller, Federal Practice and Procedure: Civil Sect. 1497 at 499 (1971); Senger v. Soo Line K. Co., 493 F. Supp. 143, 145 (D. Minn. 1980). When a suit

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is filed in federal court, the defendant knows that the whole transaction described in it will be fully scrutinized, by amendment if necessary. Barthel v. Stamm, 145 F. 2d 487, 491 (5th Cir.. 1944), cert. denied, 324 U.S. 878 (1944); see also Oliner v. McBride Industries, Inc., 106 F.R.D. 9, 12-13 (D.D.N.Y. 1985). It knows that discovery will follow, and that leave to amend will be freely granted. Conley v. Gibson, 355 U.S. 41 (1957). Thus defendant here should have anticipated that other aspects of the November 1, 1980 article might be challenged. No additional work on its part was required to prepare a defense against the added charges, other than a stretch of memory on the part of its employees. The documents, affidavits, and other elements of the case remained the same.

The plaintiffs' second amended complaint is directly related to its original and first amended complaints, and he additional libels alleged are contained in he article which was

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the subject of the original and first amended complaints. All allegations of the second amended complaint will be considered on the summary judgment motion.

V.

Plaintiffs argue that summary judgment in libel cases is a drastic device and should not usually be granted. Indeed, the Supreme Court, in a footnote in one case, had expressed doubt about the proposition, expressed by some district courts, that summary judgement as to actual malice in libel cases is the rule rather than the exception:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, New York Times v. Sullivan, 376 U.S. 254,...(1964), and does not readily lend itself to summary disposition. See 10 Wright & Miller, Federal Practice and Procedure Sect. 2730, at 590-592. Cf. Herbert v. Lando, 441 U.S. 153,... (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

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Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979); see also Wolston v.Reader's Digest Association, 443 U.S. 157, 161 n. 3 (1979) (citing Hutchinson). However, in a libel case in 1986, the Court appears to have reversed fields.

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the court had held that in a libel suit brought by a public official, the First Amendment required the plaintiff to show that in publishing a defamatory statement, the defendant acted with actual malice--"with knowledge that it was false or with reckless disregard of whether it was false or not", and that such actual malice must be shown with "convincing clarity". 376 U.S. at 285-286. These requirement have since been extended to libel suits brought by public figures other than public officials. see, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

In Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986), the Court addressed "the

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question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which New York Times applies". Id at 2508. It held that the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment. The Court found that "[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment: the requirement is that there be no genuine issue of material fact." Id at 2510 (emphasis in the original). Only facts which might affect the outcome are material:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See

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> generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure Sect. 2725,pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.
>
> More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine", that is, if the evidence is such that a reasonable party could return a verdict for the non-moving party.

Id. at 2510

Where, in a public figure case, there is a factual dispute as to the existence of actual malice, the availability vel non of summary judgment will turn on whether or not plaintiffs can establish the presence of actual malice by clear and convincing evidence:

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> ...[w]here the New York Times 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a germane issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a New York Times case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or not.

Id. at p. 2514.*1

In Liberty Lobby, the Court made reference to its Hutchinson footnote, to the effect that proof of actual malice "does not readily lend itself to summary disposition": this statement was "simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws'" Id. at 2514 n. 7 citing Calder v. Jones, 465 U.S. 783, 790-91 (1984). Thus the "convincing clarity" standard for granting or denying summary judgment in

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defamation actions, which has been the law in the Second Circuit, see Herbert v. Lando, 781 F. 2d 298, 305 (2d Cir). cert. den.. 106 S. Ct. 2916 (1986), citing Yiamouyiannis v.Consumer's Union, 619 F. 2d 932, 940 (2d Cir. 1980), cert. den. 449 U.S. 839 (1980), has now been adopted by the Supreme Court.

My function at this summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial... "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 106 S. Ct. at 2511,citing First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89 (1968). "If the evidence is merely colorable, Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam), or is not significantly probative, Cities Service, 391 U.S. at 290, summary judgment may be granted." Id.

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With these principles in mind, I address the merits of defendant's summary judgment motion.

Vl.

The threshold question is whether the various statements at issue are both false and defamatory. If they are not, they would not be actionable.

The Supreme Court recently had occasion to consider the issue of falsity in uPhiladelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986). The Court acknowledge that "[its] opinions to date have chiefly treated the necessary showings of fault rather than of falsity." Id. at 1563. It noted that "a public figure plaintiff must show the falsity of the statements at issue in order to prevail on a suit for defamation," id., and concluded that "the common law's rule on falsity--that the defendant must bear the burden of proving truth--must...fall...to a constitutional

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requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."Id. The Court recognized that under this requirement "there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false." Id.

Several courts since the Hepps decision was rendered have considered proof of falsity as a separate element of the prima facie defamation case. See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 638 F. Supp. 1149, 1153 (D.D.C. 1986) (plaintiff bears burden of persuasion of both falsity of statement and the actual malice with which it was made); In re IBPConfidential Business Documents Litigation, 797 F. 2d 632, 644-48 (8th Cir. 1986)., cert. den.sub. nom. Bagley v. IBP, Inc., 107 S. Ct. 1293 (1987) (proof of falsity additional component borne by all first amendment defamation plaintiffs; fault and falsity two separate and distinct elements); see also Machleder v. Diaz, 801 F.

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2d 46, 54 (2d Cir. 1986), cert. den. 107 S. Ct. 1294 (1987); Davis v. Costa-Gavras, 650 F. Supp. 153, 155 n. 2 (S.D.N.Y. 1986). With respect to many of the statements in the Times article plaintiffs cannot meet their burden under Hepps of establishing falsity, and on this basis alone plaintiffs cannot recover as to these statements.

Moreover, some of the statements are simply not defamatory. For these purposes, I define defamatory as any comment that tends to injure one's reputation, as "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons,and to deprive one of their confidence and friendly intercourse in society." Kimmerle v. New York Evening Journal, INc., 262 N.Y. 99, 102 (1933) (New York law) cited in Sack, Libel, Slander and Related Problems, Practising Lw Institute (2d printing, 1980) at 45.*2

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The clearest case is with respect to plaintiff's thirteenth claim, where plaintiffs contend that the following statement in the article is defamatory and false: "In St. Louis a decade ago, the seminarians dreamed of using profits from their musical talents to support their labors for the poor." SAC, par. 33. Plaintiffs contend that they actually used the profits from their musical talents to support their labors for the poor, and did not merely dream of doings so. This contention, however, does not support a finding of libel. There is nothing about the statement in the article that is either false or defamatory. Nothing about this statement injures the plaintiffs' reputation. In fact, there is other language in the article which suggests that the plaintiffs were praised for their work in St. Louis slums. This statement is not actionable.

Other statements alleged to be libelous are not false, or even if false could not be

considered defamatory, and hence are not actionable. The following statements fall into these categories:

Second statement (in part): "In a recent interview, Msgr. Andrew T. Cusack, an official with the Bridgeport Diocese, which now has jurisdiction over the mission priests, said they are 'inactive' and 'seeking reconciliation'" SAC par. 11. Plaintiffs contend that the Bridgeport diocese does not have jurisdiction over the priests. SAC. par. 12. There is simply nothing defamatory about these assertions, and from the evidence before me, it may well be that they are not false..

Third and Sixth statements: "But in 1977, the State of Connecticut got a cease and desist order against them for failing to deliver merchandise." (SAC par. 13; "In a separate action, the Postal Service charged them with fraud in the bath-oil sales." SAC Par. 19. Plaintiffs allege that these statements, among others, arise from the

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failure of the article to differentiate the individual priests from Contemporary Mission as a corporation. The individual plaintiffs argue that they were not parties to the consent decree entered into by Contemporary Mission, Inc. with the Connecticut Department of Consumer Protection, nor were they subject to the actions by the IRS or the Postal Service concerning Contemporary Mission's tax exempt status. They contend that the use of the pronoun "them" in the article referring to those actions against Contemporary Mission, Inc. was both false and defamatory.

Contemporary Mission, Inc. is the corporate form utilized by the individual plaintiffs to carry on their secular business affairs. The purpose of the mail-order business was allegedly to generate revenue to finance the Mission's more spiritual pursuits. Although technically a legally separate entity, it is also undeniably true that the individual plaintiffs controlled Contemporary Mission, Inc., determined its

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policies and were responsible for its actions, and that Contemporary Mission acted only through them.

The use of "them" in the article when "Contemporary Mission, Inc." would have been more accurate was perhaps sloppy journalism and literally false. To hold a publisher liable for defamation based on such inaccuracies, however, would be elevating form over substance to an unprecedented degree. I decline to follow such a course.

The statement with respect to the State of Connecticut's cease and desist order, SAC Par. 13, is inaccurate in that the actual cease and desist order required Contemporary Mission to desist from"accepting mail orders and payments for its merchandise and then failing to deliver either the ordered merchandise or refunds within a reasonable period of time. (emphasis added). Plaintiffs allege that the difference between what the order actually stated and what the article claimed it stated is the difference between

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being labelled a sloppy businessman and a thief. *3.

This aspect of the article is troubling, especially because this article might well be characterized as an investigative article. As such, it would have been prepared "free from the pressures and deadlines of live news." Gaeta v. New York News, Inc., 477 N.Y.S. 2d 82, 86 (Ct. App. 1984)*4. Nonetheless, as a practical matter the statement as published is substantially true. The cease and desist order was obtained for the failure to deliver merchandise. "New York law recognizes that an alleged libel is not actionable if the published statement could have produced no worse an effect on the mind of a reader than the truth pertinent to the allegation." Guccione v. Hustler Magazine, Inc. 8000 F. 2d 298, 302 (2d Cir. 1986), cert. den. 107 S.Ct. 1303 (1987), citing Flecknestein v. Friedman,, 266 N.Y. 19, 23 (1934). The third and sixth claims of the second amended complaint are not actionable.

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Seventh statement: "As evidence of the honesty of their operation, the priests point to a Federal report saying the United States Attorney's office in Connecticut had declined, in January 19 '9, to prosecute charges of mail fraud against them..." SAC par. 21. Plaintiffs allege that the U.S. Attorney's office never considered prosecuting charges of mail fraud against them. The issue of whether the U.S. Attorney declined to prosecute does not give rise to a claim of defamation. From the evidence before me it appears that this statement is not mere speculation by the author of the article, but is supported by government documents. This statement, which constitutes plaintiffs' seventh claim, is not actionable.

Eighth statement: "Father O'Reilly later married the lead singer in the touring company and is now divorcing her." SAC Par. 23. Plaintiffs allege that this statement is libelous because Father O'Reilly did not attempt to divorce his wife. SAC Par. 24.

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To find such a statement actionable would again elevate form over substance. Plaintiffs do not dispute that a divorce proceeding took place, only that O'Reilly was the initiator of that proceeding. While the language of the article may not be precise, it cannot be characterized as defamatory or false. As a statement that is substantially true, plaintiff's eighth claim is not actionable.

Ninth statement: "Under normal circumstances, Father O'Reilly's marriage would mean his automatic excommunication from the church, according to experts on Canon Law. But Father O'Reilly said he had switched to the Eastern Rite of the Catholic Church, which allows married priests." SAC Par. 25.

This statement similarly touches on plaintiff O'Reilly's divorce. Plaintiffs contend that there is no longer any such concept as "excommunication" within the Roman Catholic church, and hence "experts" on canon law would not have said what they were quoted as saying; they further argue that since

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Father O'Reilly transferred to the Eastern Rite prior to marrying he was not a member of the Roman Catholic church when he married, and therefore the question of "excommunication" would never have arisen. SAC Par. 26.

On its face, the statement at issue is not defamatory. Now where in the article does it suggest that Father O'Reilly <u>was</u> excommunicated; rather, the article simply attributes to experts the opinion, whichmay well be erroneous, that O'Reilly <u>would</u> have been excommunicated as a Roman Catholic priest under given circumstances. Plaintiffs read into the article what is not there. Furthermore, the author of article quoted so-called experts on Canon Law and plaintiff O'Reilly in the same paragraph on this subject. This balance negates any inference that the average reader might draw against plaintiff O'Reilly. There is no factual assertion in this statement which is false: For these reasons, plaintiffs' ninth claim is

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not actionable.

In finding non-actionable the statements which constitute plaintiffs' second (in part), third, sixth, seventh, eight, ninth and thirteenth claims, I have recognized that false statements of fact which are libelous can be actionable. Obviously, the author of an article cannot "make up facts out of whole cloth." Rinaldi v. Holt, Rinehart & Winston, Inc., 397, N.Y.S. 2d 943, 952 (Ct. App. 1977), cert den. 434 U.S. 969 (1977) , citing Spahn v. Julian Mesner, Inc. 286 N.Y.S. 2d 332 (Ct. App. 1967), app.dsmd.., 393 U,.S. 1046 (1969). However, "omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function." Rinaldi, 397 N.Y. S. 2d at 952 uciting James v. Gannett Co., 386 N.Y.S. 2d 871, 877 (Ct. App. 1976). With respect to the statement discussed above, plaintiffs have not demonstrated that the defendant's actions

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went further than simply making imprecise or inarticulate statements. "Where, as here; 'the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." Guccione v. Hustler Magazine, Inc. 800 F. 2d 298, 303 (2d Cir. 1986), cert. den. 107 S. Ct. 1303 (1987)., citing Cafferty v. Southern Tier Publishing Co., 226 N.Y. 87, 93 (1919).

The Supreme Court in Hepps noted that its decision added "only marginally to the burdens that the plaintiff must already bear as a result of [its] earlier decisions in the law of defamation. The plaintiff must show fault." 106 S. Ct. at 1565. It also acknowledged that the inquiries into whether statements are false and whether the publisher of those statements adequately investigated the truth of the published statements or was at fault for failing to do so are overlapping; "As a practical matter,

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then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted." Id.

With that guideline in mind, I turn now to the question of defendant's fault.

VII.

The threshold issue as to defendant's fault is the determination of the plaintiffs' status as public or private figures. This determination must be made initially in order to ascertain the standard of fault plaintiffs must establish in order to succeed on their claims. If plaintiffs are public figures, then they cannot prevail in this action absent clear and convincing proof of actual malice by the defendant. If, however, plaintiffs are private figures, then the subject matter of the allegedly defamatory statements must be considered, and determination made as to whether the subject

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matter is of public or private concern.

As has already been noted, the Supreme Court in New York Times Co. v. Sullivan, 3765 U.S. 254, 279-80 (1964), placed a significant constitutional limitation on the ability of a public official to recover in an action for libel, holding that he cannot be awarded damages for a defamatory falsehood concerning his official conduct unless he proves that the statement was published with "actual malice." The Supreme Court extended the rule of New York Times Co. to "public figures", at least in matters of public interest, in Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967). In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court defined two classed of public figures, general and limited: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Id. at 351. This is the general public figures. The other category is the limited public figure. The Court

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explained that "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Id.

In Gertz, the Court considered the case of a private individual who brought a libel action, and the standards which states could use in determining whether to permit the imposition of liability for making defamatory statements about such private individuals. It held that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious o a private individual." Id. at 347.

The New York Court of Appeals responded to the Supreme Court's invitation to define the standard of liability in Chapadeau v. Utica Observer Dispatch, 379 N.Y.S. 2d 61 (1975):

...[W]ithin the limits imposed by the

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> Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

Id. at 64

Thus if a plaintiff is a private individual and the subject matter is of public concern, then the plaintiff, to prevail under New York law, must demonstrate by a preponderance of the evidence that defendant in its preparation of the libelous statement complaint of "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v. Utica Observer-Dispatch, 379 N.Y.S. 2d 61, 64 (1975).

In Gertz, the Supreme Court rejected the

argument that the plaintiff there, a reputable lawyer, was a public figures, holding that "in looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," it was plain that Gertz was not a public figure. Id. at 352. This was so because he did not "thrust himself into the vortex of [a] public issue, nor did he engage the public's attention in an attempt to influence its outcome." Id.

The Second Circuit has had occasion to consider the public figure doctrine in detail, and has succinctly summarized the relevant cases since Gertz:

> Emphasizing that the New York Times standard does not hinge on whether the statement concerns a matter of public interest, the Supreme Court held that a cause celebre divorce in Florida involving a prominent and wealthy couple was not a 'public controversy'. Time, Inc. v. Firestone, 424 U.S. 448, 454 (1975). Moreover, the fact that Mrs. Firestone sought to obtain marital redress through a court proceeding is not the kind of voluntary act or assumption of prominence in the resolution of public questions as to

render her a 'public figure.' Id. at 454-55. Four years later, the Court ruled that a person was not a public figure merely because he refused to appar before a grand jury, fully realizing that his refusal might attract publicity, because he was believed to have information of interest to the government relating to Soviet espionage. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979). Rather than thrusting himself to the forefront of the public controversy surrounding the extent of Soviet espionage in the United States, the petitioner in Wolston was dragged unwillingly into the controversy. Id. at 166. Again, becoming the recipient of Senator Proxmire's Golden Fleece Award as a result of the receipt of federal funds for research projects did not make plaintiff a limited public figure. Hutchinson v. Proxmire, 443 U.S. 111 (1979). Although, like the petitioner in Gertz, Hutchinson was a writer for professional journals, he did not thrust himself or his views into the public eye to influence others, nor did he invite public attention or have regular and continuing access to the media. Id. at 135-36.

Lerman v. Flynt Distributing Co., Inc. 745 F. 2d 123, 136 (2d Cir. 1984), cert den 471 U.S. 1054 (1985). In Lerman, the Second Circuit found that the question in each of these Supreme Court cases was "what is 'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" Id. citing Gertz, 418 U.S. at 352; Wolston, 443 U.S. at 167.

The Second Circuit in Lerman then set forth the requisites for a finding that a libel plaintiff is a "limited purpose public figure":

> A defendant must show the plaintiff has: (1) successfully invited the public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.

Lerman, 745 F. 2d at 137.

The question of whether the plaintiffs in this action are public figures, limited or otherwise, is one of law to be decided by the

court. Rosenblatt v. Baer, 383 U.S. 75, 88 n. 15 (1966); Dameron v. Washington Magazine, Inc. 779 F. 2d 736, 740 (D.C. Cir. 1985). cert.den 106 S. Ct. 2247 (1986). If found to be public figures, plaintiffs cannot recover unless there is "clear and convincing proof" that the article was published "with knowledge of its falsity or with reckless disregard for the truth." Gertz, 418 U.S. at 342.

VIII.

Plaintiffs cannot be characterized as general purpose public figures. They have simply not achieved the "pervasive fame or notoriety" that would warrant that status. The relevant inquiry is whether plaintiffs are limited purpose public figures. In determining whether a plaintiff is a limited purpose public figure under Gertz and its progeny, an analysis of the nature of the controversy and the plaintiffs' role in that

controversy is required.

In this case, two distinct controversies are involved. The first is the "religious controversy" concerning plaintiff's ordination and their status as priests. Included in this category must be plaintiffs' artistic endeavors, which went hand-in-hand with their religious mission. The second controversy concerns the actions taken by various governmental agencies against the Contemporary Mission mail order business. Any analysis of the particular facts of this case also requires consideration of another issue: whether if the plaintiffs were limited public figures a decade ago they should continue to be characterized as limited purpose public figures in this lawsuit.

A. The Religious Controversy: Plaintiffs Public Figures

The religious controversy surrounding plaintiffs' ordination in and of itself generated widespread press coverage and attracted public attention for several years.

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It apparently remains a current controversy, never definitively having been resolved.

The existence of the continuing religious controversy, even with the context of plaintiffs' erstwhile musical activities, does not with out more establish that plaintiffs are (or were) public figures. The Supreme Court has repeatedly looked for some further voluntary conduct by a plaintiff to render him a public figure for constitutional purposes. I must determine whether plaintiffs voluntarily "'thrust themselves to the forefront of ... [the] public controversy[y] in order to influence the resolution of the issues involved'" Velle Transcendental Research Assn v. Sanders, 518 F. Supp. 512, 517 (C.D. Calif. 1981) citing Gertz, 418 U.S. at 345. I must also consider whether plaintiffs "successfully invited public attention to [their] views in an effort to influence others", whether they "assumed a position of prominence" in the controversy, and whether they maintained regular access to

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the media. Lerman, 745 F. 2d at 1337. For the reasons which follow, I find that they did.

In Gertz, the Court held that an attorney was not a public figure even though he voluntarily associated himself with a case that was certain to receive a great deal of media exposure. 418 U.S. at 352. The Supreme Court held in Wolston, 443 U.S. at 166, that Ilya Wolston did not thrust himself voluntarily into the investigation of Soviet espionage in the United States. The "mere fact that [Wolston] voluntarily chose not to appear before [a] grand jury, knowing that his action might be attended by publicity, [was] not decisive on the question of public figure status." Id. at 167. In this case, however, the plaintiffs' self-promotion was the antithesis of the comportment of Gertz and Wolston.

The musical careers of the members of Contemporary Mission in and of itself focused public attention on them and the religious

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controversy surrounding them. Moreover, Contemporary Mission and some, if not all, of its members were directly implicated in the controversy surrounding the ordination of some of its members. At least some of the plaintiffs actively participated in that controversy, issuing press releases and conducting interviews designed to advance their positions with respect to the controversy. Thus their participation in the controversy was not passive. They played prominent roles.

The individual plaintiffs, through active public relations activities and otherwise, gained "access to the channels of effective communication and hence ...a...realistic opportunity to counteract false statements." Gertz, 418, U.S. at 344. The nature of plaintiffs' apostolic mission necessitated communication with the general public. During and after the time the Mission Singers were formed, some or all of the plaintiffs granted interviews, issued press releases, made

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nationwide and local television appearances, participated in radio programs, gave live musical performances, sold records and wrote books. These activities evidence that, in the late 1960's and early 1970's, plaintiffs had access to the media and were very much in the public eye. These plaintiffs were not "dragged unwillingly" into the controversy. Cf. Wolston, 443, U.S. at 166. Their activities within the Catholic Church, especially as they related to the publicity concerning the ordination of some of them, constituted aggressive efforts on their part to publicize themselves and their positions.

Taking all of these facts together, plaintiffs must be considered at least limited purpose public figures for the period of time when their artistic careers, combined with the religious controversy regarding ordination, was at its peak. Plaintiffs recognized this status themselves when they wrote to Cardinal Carberry in 1971 to thank him for making them "celebrities, almost

household words."*5.

B. The Lapse of Time Issue

Plaintiffs argue that even if they were public figures with respect to the 1971 ordinations, they can no longer be considered public figures for the purposes of this action. While plaintiffs concede that defendant's Publicity Appendix includes almost 200 articles which were written about them prior to 1974, they assert that since that time there has been a paucity of publicity, and plaintiffs have returned to private life. The activities of some of the plaintiffs as members of The Mission Singers took place prior to 1974, and there have been on national television appearances or concerts since that time, nor have any record albums been produced by The Mission Singers in the past 13 years.

The Supreme Court has explicitly left unanswered the question of "whether or when an individual who was once a public figure may lost that status by the passage of time."

Wolston, 443 U.S. 157, 166 n. 7 (1979)*6

The Second Circuit, in an opinion which antedated by many years the constitutional developments stemming from Sullivan and Gertz, dealt with the question of persistency of public concern in a matter. It found that the passage of time did not alter the standard of liability, and affirmed a judgment for a magazine that had updated a 27-year old story about a child prodigy despite the fact that he had become a recluse. Sidis v. F-R. Publishing Corp., 113 F. 2d 806 (2d Cir. 1940) cert. denied, 311 U.S. 711 (1940). The court reasoned that the prodigy's "subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern." Id. at 809.

While the Second Circuit has not squarely addressed the issue of endurance of public figure status, it seems to have assumed sub silentio that the public figure status is, or

may be, retained over the passage of time. In Meeropol v. Nizer, 560 F. 2d 1061, 1066 (1977), cert. denied, 434 U.S. 1013 (1978), the children of Julius and Ethel Rosenbert, having spent most of their early years in the limelight (through no efforts or activities of their own), were found to be public figures for purposes of subsequent commentary on the Rosenberg trials in a book published 20 years after the execution of their parents.

Other courts have addressed this issue more recently and more explicitly.

In Street v. National Broadcasting Company, 645 F. 2d 1227 (6th Cir.) cert. granted 454 U.S. 815, cert. dismissed, 454 U.S. 1095 (1981), the Sixth Circuit rejected plaintiff's argument that even if she was a public figure at the time of the well-publicized Scottsboro trial in the 1930's, she lost her public figure status over the intervening years. Id. at 1235. The court emphasized that "[t]here is no reason for the

debate to be any less vigorous when events that are the subject of current discussion occurred several years earlier. The mere passage of time does not automatically diminish the significance of events or the public's need for information." id. at 1236.

In Brewer v. Memphis Publishing Co., 626 F. 2d 1238, 1256-57 (5th Cir. 1980) cert.den. 452 U.S. 962 (1981), plaintiff was an entertainer who had retired for eight years while she became a companion of another entertainer, Elvis Presley. Plaintiff "had gained media exposure and fame through her career and her romantic relationship with Presley, an extremely well-known entertainer, and [her] name continue to appear in stores about Presley after her retirement..." She " was required to prove malice in [a] suit based on an article that dealt primarily with that romantic relationship and incidentally with her marital status." 626 F. 2d at 1257.

The Mississippi Supreme Court in Newson v. Henry, 10 Med. L. Rptr. 1421 (1984), ruled

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that a libel plaintiff who was clearly a public figure when he ran unsuccessfully for deputy sheriff in 1967 and who subsequently retired from public life nevertheless remained a public figure for purposes of commentary in 1980 upon that 1967 campaign.

In Holt v. Cox Enterprises, 10 Med. L. Rptr. 1699 (N.D.Ga. 1984), the plaintiff, a star Alabama football player who had been involved in a highly publicized incident during a 1961 football game that precipitated a public controversy about college football, was held to be a public figure in his libel action against a newspaper which had published articles in 1979 recounting the 1961 incident.

All of these cases stand for the proposition that "[o]once a person becomes a public figure, he or she remains a public figure with respect to the event or events that made him or her a public figure in the first place."newson, 10 Med. Le. Rptr. at 1424-25. That proposition is applicable in

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this case. Thus, because the plaintiffs were public figures with respect to their religious controversy in the early 1970's, they remain public figures with respect to later commentary upon or treatment of that controversy. The November 1, 1980 article addressed the religious controversy, with respect to which plaintiffs were public figures in the late 1960's and early 1970's. For purposes of the allegedly defamatory statements pertaining that controversy, plaintiffs remain public figures.

C. Plaintiffs' Status in the Business Controversy

The remaining issue with respect to plaintiffs' status is whether they are also public figures for purposes of the business controversy. This issue has been mooted to the extent that I have already found that the three statements pertaining exclusively to the business controversy (statements 3, 6,

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and 7, supra. pp.8-9) are either not defamatory or not false as a matter of law, and therefore not actionable (see pp. 22-25, supra). However, there are two other statements, claims 10 and 11, which I have characterized as hybrid statements pertaining to both the religious and the business controversy. Thus it is necessary to consider the issue of plaintiffs' status in the business controversy. To consider plaintiffs' status in this context raises the question as to whether plaintiffs can be characterized as public figures for some purposes and private for others. This novel question arises to the extent that I construe the Times article to address two separate and distinct controversies.

Plaintiffs contend that with regard to the controversy concerning Contemporary Mission's mail-order business they have conducted themselves much differently; they have issue no press releases and have not sought to publicize their position through

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the media. Although their business has sent out over 12 million mailings since 1976, they argue that none of those mailings was related to the current controversy except as one of its causes. They submit that a person does not become a public figure merely because he is a criminal defendant, Wolston, 443 U.S. 157 (1979(or because he is involved in litigation, Firestone, 424 U.S. 488 (1976), and that this rule should not have a different application when the litigant happens to be in the mail-order business.

At least one recent case from this district addresses the issue. In Adler v. Conde Nast Publications, Inc., 643 F. Supp. 1558 (S.D.N.Y. 1986), Renata Alder, a well-known writer and critic, brought a libel suit, contending that an article about her departure from an editorial position with a magazine defamed her by falsely asserting that she was fired for incompetence and dishonesty. In finding no malice as a matter of law on the part of one of the defendants,

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the court ruled that Adler's general fame rendered her a public figure "with regard to her activities relating to literature, journalism and criticism," id. at 1565, and that she could not now claim, "with regard to an article concerning her activity as a writer/editor published in a magazine directly principally to persons interested in literary matters, that she is not a public figure."Id.

It is true that Contemporary Mission and its members did not seek the attention of the IRS, the Postal Service or the Connecticut Department of Consumer Protection. They did not thrust themselves voluntarily into the investigations of their activities and, in marked contrast to their actions in the religious controversy, they have not utilized the media to further their points of view or to attempt to sway public opinion.

However, plaintiffs have conducted their business activities as members of a religious community, with respect to which the

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religious controversy subsists. The lead paragraph of the article, which constitutes plaintiffs' tenth claim, suggests the intertwined nature of the plaintiffs' various activities: "Five Roman Catholic priests, whose religious status is being challenged by officials of their own church, as well as by three Federal agencies, say they have been misunderstood and harassed because they are unconventional clerics." This statement explicitly addresses plaintiffs' status as religious, and it is clear that the focus of the article is on the plaintiffs as priests. It is highly unlikely such an article would have been written and given such prominent coverage were the plaintiffs simply Connecticut businessmen; the thrust of the story was that a group of priests, with a somewhat unusual history, had encountered challenges by the government. The overlapping of the two controversies is epitomized by the fact that plaintiff's mail-order business which has been challenged by the government

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was created to generate revenue to finance the plaintiffs' religious pursuits.

Plaintffs were and continue to be public figures with respect to the religious controversy. The fact that they avowedly carried on their business activities in furtherance of their religious commitments constituted them public figures with respect to those activities as well.

Thus, in order to prevail as to the allegedly defamatory statements pertaining to either controversy, plaintiffs must prove actual malice on the part of defendant.

IX.

A. Standard of Malice in Public Figure Libel Cases

As limited public figures plaintiffs with respect to all of their activities, Contemporary Mission and its members must establish actual malice in order to recover actual damages in a defamation suit. "In general terms, a defendant can be said to have acted with actual malice, in the

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constitutional sense, when: (1) a statement is made with actual knowledge of its falsity, New York Times Co. v. Sullivan, 376 U.S. at 279-280; or (2) there is a high degree of awareness of the statement's probably falsity, Garrison v. Louisiana, 379 U.S. 64, 74 (1964); or (3) a statement is made with reckless disregard of its truth or falsity, New York Times Co. v. Sullivan, 376 U.S. at 279-80. In addition,a actual malice must be shown by 'clear and convincing' evidence." Fitzgerald v. Penthouse International, Ltd. 525 F. Supp. 585, 597 (D. Md. 1981), aff'd in part and rev'd in part, 691 F. 2d 666 (4th Cir. 1982) cert. den. 460 U.S. 1024 (1983), citing Gertz. v. Robert Welch, Inc. 418 U.S. 323, 342 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

Malice, as the Supreme Court enunciated in New York Times, does not mean hatred or ill will. Garrison v. Louisiana, 379 U.S. 64, 78-79 (1964). Instead, plaintiffs must show that the Times either deliberately falsified

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its statements concerning the controversies or published them "recklessly" despite its awareness of their probably falsity. St. Amant v. Thompson, 390 U.S. 727, 730 (1968). According to the Supreme Court in St. Amant, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [its] publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." Id. at 731. The Second Circuit has observed:

> [A] finding of actual malice cannot be predicated merely on a charge that a reasonable publisher would have further investigated before publishing... Rather, a public figure defamation plaintiffs must show either that the publisher actually entertained serious doubts about the veracity of the publication, or that there are 'obvious" reasons to doubt the veracity of the informant or the accuracy of his reports.'

Herbert v. Lando, 781 F. 2d 298, 308 (2d Cir. 1986), cert. den. 106b S. Ct. 2916 1986) citing St. Amant, 390 U.S. at 731.

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Guided by this definition of actual malice, as well as by the Supreme Court's ruling in Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986 that the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment in a libel case, I turn to the issue of actual malice.

B. Requests for Further Discovery on the Malice Issue

I first address plaintiffs' threshold argument that the evidence on the issue of actual malice has not been fully marshalled and that further discovery is needed, and specifically plaintiffs' remaining requests for further discovery pursuant to F.R. Civ. P. 56(f).

Plaintiffs have contended that Times reporter Diane Henry's state of mind is at issue in deciding whether the defendant acted with actual malice. They also urge that be allowed to depose Henry's husband, Nicholas Horrock, who was at the time of the article

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the deputy metropolitan editor at the Times. Plaintiffs observe that Horrock was an investigative reporter at the Times prior to his editorial position. Accordingly, plaintiffs argue that it should be "self-evident" that further discovery is required with respect to the state of mind of Henry and Horrock.

Plaintiffs seek additional discovery under Fed. R.Civ. 56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(emphasis added.)

The Second Circuit has enunciated the standard to be used in Rule 56(f) motions in Quinn v.Syracuse Model Neighborhood Corp., 613 F. 2d 438 (2d Cir. 1980): "At least when the party opposing the motion has not been dilatory in seeking discovery, summary

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judgment should not be granted when he is denied reasonable access to potentially favorable information." Id. at 445 (emphasis added).

Plaintiffs under Rule 56(f) must therefore establish 1) that they had been denied reasonable access to the material requested; and 2) that the material requested constitutes potentially favorable information. In addition, plaintiffs must identify specific issues of material fact which are likely to be disclosed if they are granted a reasonable opportunity to pursue the additional discovery they seek. See Federal Republic of Germany v. Elicofon, 536 F.Supp. 813 (E.D.N.Y. 1978) aff'd sub nom, Kunstsammlungen Zu Weimar v. Elicofon, 678 F. 2d 1150 (2d Cir. 1982).

In an earlier case involving the corporate plaintiff, Contemporary Mission, Inc. v. U.S. Postal Service, 648 F. 2d 97, 107 (2d Cir. 1981), plaintiff was denied additional discovery under Rule 56(f) because

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it failed to justify its allegations: "[a] 'bare assertion' that the evidence supporting a plaintiffs' allegation is in the hands of the defendant is insuficient to justify a denial of a motion for summary judgment under Rule 56(f)." Rule 56(f) is not a license for a fishing expedition. Quinn teaches that the plaintiffs would need to demonstrate that the material they expect to develop by further discovery is probably available, and is potentially favorable to them. Plaintiffs have not met their burden of showing how the deposition of Horrock would produce material evidence which would be potentially favorable to them.

Defendant has already answered interrogatories identifying everyone at the Times who worked on the allegedly libelous article. Mr. Horrock was not one of those persons. Ms. Henry has already been extensively deposed on the subject. Plaintiffs assert that a deposition of her husband, Nicholas Horrock, would produce more

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evidence of actual malice. They allege that he was the "editorial boss" of Diane Henry as well as her husband, and must have had input with respect to the article in question.

It is, of course, possible that Ms. Henry discussed her research and the formulation of the article with Mr. Horrock in his capacity as her husband, but the record indicates that he had n nothing to do with the editing of the article.

None of the other bases upon which plaintiffs seek further discovery has merit. I deny plaintiffs' motion for further discovery.

C. Insufficient Evidence to Support Finding of Malice

Plaintiffs allege that Diane Henry's malice permeates the article of November 1, 1980. Plaintiffs set forth several instances of conduct which, they claim, constitute actual malice. However, they confuse constitutional "actual malice" with common law malice or ill-will.

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In arguing that Ms. Henry "blackened" and "wrecked" their reputation, that she was "obsessed" with the article, and that she "did her dirty work well" plaintiffs fail to demonstrate any reckless disregard of the truth. In short, their allegations fail to satisfy the standards for actual malice set forth by the Supreme Court.

The Second Circuit has noted, in addressing a claim of slander of title, that a "plaintiff does not become entitled to a jury trial simply by asserting a cause of action in which the defendant's state of mind is a material element. Some facts must be asserted to support the claim that the state of mind existed." Markowitz v. Republic National Bank of New York, 651 F. 2d 825, 828 (2d Cir. 1981). Plaintiffs here have failed to set forth specific facts indicting constitutional actual malice on the part of the defendant.

Plaintiffs claim, as to the religious controversy, that Ms. Henry authored a series

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of defamatory statements which struck at the heart of the individual plaintiffs' profession. Specifically, 1) they assert that she ignored plaintiffs' warnings that any accusation that documents were forged for plaintiffs' ordination would be untrue and defamatory; 2) they conclude that Ms. Henry's failure to ascertain the accuracy of the charges after being explicitly warned evidences actual malice; and 3) they argue that three of Ms. Henry's sources now say that they did not give her the information she claims she received, and that this constitutes further evidence of actual malice.

Publication in the face of a denial by plaintiffs of a statement's truth does not demonstrate actual malice. "[S]uch denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." Edwards v. National Audubon Society, Inc., 556 F. 2d

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113, 121 (2d Cir. 1977) cert.denied, 434 U.S. 1002 (1977).

The article may not epitomize investigative journalism at its best. It is subject to the criticism that it is sloppily written in places, that it does not follow up certain points, and that it is sometimes quite vague. However, "[l]iteral accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made." Id. at 120 citing Time, Inc. v. Pape, 401 U.S. 279 (1971).

Despite the article's deficiencies, its author made an attempt to report plaintiffs' side of the story. The article stated for example, that the priests were ordained, that they disclaimed knowledge of any forged documents in connection with their ordination, and that they performed and

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intended to perform many altruistic acts. Compare Cianci v. New Times Pub. Co., 639 F. 2d 54 (2d Cir. 1980) (case on which plaintiffs rely where New Times made no mention of plaintiff's claim of innocence in an article discussing charges of rape against him.)

Defendant has submitted as exhibits the reporter's interview notes, and a number of published newspaper articles dealing with the religious controversy in which plaintiffs were involved. While plaintiffs dispute the accuracy of some of those articles, they have not offered a scintilla of evidence to satisfy their burden of proving that the Times knew that the statements it published were false because the sources upon which they were based were false. True it is that a publisher "who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure,cannot rely on a privilege of

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neutral reportage." Edwards, 556, F. 2d at 120. The article certainly reflects no sympathy for the posture or plight of plaintiff; it is probably that the Times saw newsworthiness in the fact that members of a Catholic religious order were beleagured. However, nothing before me suggests that the author of the article in question, or anyone at the Times, deliberately distorted any statements, or recklessly disregarded the truth or falsity. Plaintiffs have simply not shown that the Times "entertained serious doubts about the veracity of the publication," or that there were signs which should have tipped the Times off to any blatant inaccuracies in the article.

D. The Article's Cumulative Effect

One further point merits discussion. In Herbert v. Lando, 781 F. 2d 298, 307 (2d Cir. 1986), cert. den 106 S. Ct. 2916 (1986), a recent Second Circuit libel decision,

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plaintiff appealed the district court's refusal to consider the "overall impact" of the television broadcast and magazine article that had given rise to the lawsuit.The district court had ruled that a defamation plaintiff was obliged to specify those statements which he claimed were made withactual malice. Plaintiff claimed that the publications in overall impact were defamatory and demonstrated actual malice, and that the district court should have considered the defamatory nature of the publications as a whole. The Second Circuit disagreed, holding that the "overall impact" of the broadcast and article could not itself constitute a cause of action.

While plaintiffs in the instant case do not explicitly plead a separate cause of action predicated on the overall impact of the article, such a theory pervades their arguments. On the basis of Lando, I reject this argument as well. While it is true that "offending statements can only be viewed in

context of the writing as a whole, and as disembodied words, phrase or tences," Gaeta v. New York News, Inc., 477 .S. 2d 82, 85 (Ct. App. 1984), in this e, "the defamatory implications of the cific statements and the overall impact of publications are [virtually] identical" ndo, 781 F. 2d at 308. Moreover, an luation of the article as whole reveals t plaintiffs' position with respect to the ious controversies is sufficiently resented. In fact, the article includes at st 11 different statements which directly te the plaintiffs themselves, or ributes positions to the plaintiffs, luding the article's lead.

Thus, to the extent plaintiffs argue that cumulative effect or overall impact of article is defamatory, I disagree. "While is true that the courts'"'will not strain' interpret [allegedly defamatory works] 'in ir mildest and most inoffensive sense to d them nonlibelous'" (November v. Time,

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Inc., 244 N.Y. 2d 309, 311, quoting Mencher v Chesley, 297 N.Y. 94, 99), it is also true courts will not strain to find a defamatory interpretation where none exists (see Tracy v. Newsday, Inc., 182 N.Y.S. 2d 1)." Cohn v. National Broadcasting Co., Inc. 430 N.Y.S. 2d 265, 265 (Ct. Appl. 1980), cert.den., 449, U.S. 1022 (1980.

Because plaintiffs have not established actual malice in the constitutional sense, I grant defendant's motion for summary judgment concerning the statements alleged to be defamatory in plaintiffs' Second Amended Complaint*7.

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In summary, in this Memorandum Order I have made the following determinations:

1. Defendant's motion to dismiss the 10 new claims in the second amended complaint on statute of limitations grounds is denied.

2. I grant summary judgment to defendant

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with respect to plaintiffs' second (in part), third, sixth, seventh, eight, ninth and thirteenth claims because they are either not defamatory nor not false or both.

3. Plaintiffs' request for further discovery pursuant to F.R. Civ. P. 56(f)is denied.

4. Summary judgment is granted as to all of plaintiffs' claims and the complaint is dismissed because plaintiffs have provided insufficient evidence to support a finding of actual malice.

SO ORDERED.

VINCENT L. BRODERICK, U.S.D.J.

Dated: New York, New York

July , 1987

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FOOTNOTES

1. The Second Circuit has construed Liberty Lobby to be a demonstration of the Supreme Court's "willingness to dispose of libel claims brought by public figure plaintiffs on summary judgment." Guccione v. Hustler Magazine, Inc., 800 F. 2d 298, 301 n.3 (2d Cir. 1986), cert.den. 107 S.Ct. 1303 (1987).

2. To the extent it is necessary to reach this issue, I reject plaintiffs' argument that Connecticut law should apply, and where appropriate apply New York law.

3. Defendant itself has proffered the evidence that might create a material question of fact concerning whether the publication of the statement was grossly irresponsible. Diane Henry, the author of the article, contends that she relied on a press release from the Connecticut Department of Consumer Protection that omitted the words emphasized above. But Ms. Henry was also in possession of the Department's complaint against Contemporary Mission, the cease and desist order itself, and as subsequent press release from the Connecticut Department of Consumer Protection, both of which contained the language omitted from the press release upon which she relied. INcorrectly reporting facts which are matters of public record does not, by itself, establish gross irresponsibility Chapadeau v. Utica Observer-Dispatch, 379 N.Y.S. 2d 61 (Ct. App. 1975); see also Robart v. Post-Standard, 425 N.Y.S. 2d 891 (3rd Dept. 1980), aff'd, 437 N.Y.S. 2d 71 (Ct. App. 1981); Grobe v. Three Village Herald, 420 N.Y.S. 2d 3 (2d Dept. 1979), aff'd 428 N.Y.S. 2d 676 (Ct. Appl. 1980). However, relying on an inaccurate press release when in possession of an accurate one as well as the actual documents referred to in the press release, might create an issue of fact as to whether inaccurate reporting is grossly irresponsible under those

circumstances.

4. While the lower court in Gaeta found that the writing of an investigative story "demanded a more rigorous standard than basic news reporting, where time pressures, in terms of newsworthiness, are critical, " 4656 N.Y.S. 2d 321, 326 (1st Dept. 1983), the Court of Appeals in reversing did not squarely address this issue.

5. In a similar case,a California district court, after considering various newspaper articles publicizing a religious group's way of life, held that a public controversy existed over the nature and legitimacy of the small religious group involved and also found the plaintiffs to be public figures. See Velle Transcendental Research Ass'n v. Sanders, 518 F. Supp 512 (C.D. Calif. 1981). In Velle, as in this case, plaintiffs were members of a non-profit religious organization whose practices were contested and whose conduct led to government action against the group.

6. The lower courts inWolston had held that plaintiff was a public figure and had rejected his argument that the passage of time had diminished his status to a private figure for first amendment purposes. He subsequently abandoned this argument before the Supreme Court and thus the Court's majority opinion did not address the issue. However, it should be noted that Justice Blackmun's concurrence, joined by Justice Marshall, explored this issue in detail, can concluded that "the lapse of 16 years between petitioner's participation in the espionage controversy and respondents' defamatory reference to it was sufficient to erase whatever public-figure attributes petitioner once may have possessed." Wolson, 443 U.S. at 171. See Brewer v. Memphis Publishing Co., 626 F. 2d 1238, 1256 (5th Cir. 1980) (discussing Wolston concurrence).

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7. This grant of summary judgment on the basis of failure to establish actual malice applies with respect to all statements in the article, including those which I have found to be not false or not defamatory.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 439—August Term, 1982

(Argued October 8, 1982 Decided November 2, 1982)

Docket No. 82-7530

JOHN T. O'REILLY,

Plaintiff-Appellant,

—and—

CONTEMPORARY MISSION, INC., et al.,

Plaintiffs,

—v.—

THE NEW YORK TIMES COMPANY,

Defendant-Appellee.

Before:

FRIENDLY, NEWMAN and KEARSE,

Circuit Judges.

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Appeal by Rev. John T. O'Reilly from an order of the District Court for the Southern District of New York, Vincent L. Broderick, *Judge*, denying appellant's motion to discharge his counsel and proceed *pro se* in a multi-plaintiff civil action. Reversed.

REVEREND JOHN T. O'REILLY, c/o Contemporary Mission, Inc., Westport, CT, *Plaintiff-Appellant Pro Se.*

JOHN G. KOELTL, New York, NY (Debevoise & Plimpton, James C. Goodale, Mitchell A. Karlan, Robert P. Connolly, of counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

In this action in the District Court for the Southern District of New York, in which federal jurisdiction is predicated on diverse citizenship, 28 U.S.C. § 1332, Contemporary Mission, Inc., a not-for-profit organization of Catholic priests based in Westport, Connecticut, and four of its five member-priests, including appellant Rev. John T. O'Reilly, have sued The New York Times Company for libel. The alleged libel, printed in the Times for November 1, 1980, was an article about the Mission and its priests by Diane Henry. The article said, *inter alia*, that church officials in St. Louis, led by John Cardinal Carberry, had accused the priests of forging documents for

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their ordinations; that Monsignor Cusack of the Bridgeport, Conn., Diocese had written that the priests were not recognized by the diocese and were unable to function as Catholic priests; that in 1977 the State of Connecticut had gotten a cease and desist order against them for failing to deliver merchandise; that the Postal Service had charged them with fraud in the sale of bath-oil; that Father O'Reilly had married, which would normally mean his excommunication from the Roman Catholic Church, but that he said he had switched to the Eastern Rite of the Catholic Church which allows priests to marry; and that the Mission's public court record "raises questions about whether the priests may have cloaked a profitable business in the guise of a religious, tax-exempt organization." Plaintiffs allege that these and other statements are false or so incomplete as to convey a misleadingly false impression. The initial complaint, filed on November 20, 1980, and the first amended complaint, filed on December 10, 1980, were signed both by Leonard H. Rubin, Esq., for the New York City law firm of Anderson/Rubin, and by appellant's brother, William D. O'Reilly, Esq., who gave a New Hampshire address. There is no indication, however, that Anderson/Rubin have taken any significant part in the action. William O'Reilly conducted the extensive discovery and motion practice which preceded appellant's request to proceed *pro se*; Anderson/Rubin presumably performed occasional ministerial chores in their capacity as local counsel. The supplemental answer to the first amended complaint contains what amounts to a general denial and pleads ten affirmative defenses.

On April 29, 1982, thirteen days after the Times had filed notice that it was proposing to move for summary judgment, Rev. John O'Reilly wrote the district judge to say that he had discharged William, without cause and

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with the latter's consent, and that pursuant to 28 U.S.C. § 1654[1] he would thereafter plead and conduct his case *pro se*. On April 30 counsel for the Times filed a letter of protest with the judge arguing, *inter alia*, that, as the magistrate supervising discovery had already indicated on April 27 when William O'Reilly had announced his brother's intention, Rev. O'Reilly would have to move under Rule 3(c) of the General Rules of the Southern District.[2] The judge rejected Rev. O'Reilly's letter with a handwritten endorsement dated April 30, 1982, reading:

> Application denied. See Rule 3, General Rules of this court. So ordered.

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1 This section which now reads:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

derives from the first sentence of § 35 of the Judiciary Act of 1789, 1 Stat. 73, 92. This read:

> In all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.

It was carried without substantial change into R.S. § 747. Especially in light of the original wording it is clear that the "as" clause is only a limitation on who may appear as counsel and does not qualify the right of self-representation.

2 This provides:

> An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar.

On May 27, 1982, Rev. O'Reilly made a formal motion to proceed *pro se*. Counsel for the Times answered with an affidavit placing two documents before the court: The first was a notice by attorney William O'Reilly, dated December 18, 1981, changing his address to care of Contemporary Mission, Inc., 285 Saugatuck Avenue, Westport, Conn. The second was an excerpt from a deposition of one of the plaintiffs, Rev. Patrick J. Berkery, taken on January 20, 1982, in which counsel for the defendant took note of Father O'Reilly's presence and asked attorney William O'Reilly in what capacity he appeared. William answered that Father O'Reilly "is assisting me in a paralegal capacity, as he has throughout the course of this civil action." Counsel for the Times objected to his presence as such but the deposition continued.

The district judge heard oral arguments on the application to appear *pro se* on June 23, 1982. The judge denied the motion in an oral opinion set forth in the margin.[3]

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[3] In my judgment Mr. O'Reilly has been in the position and is in a position to render effective legal service to Father O'Reilly.

I find that it would be disruptive to the process of the trial to have Father O'Reilly represent himself. If he had originally intended to represent himself, it might have been a different story. I am concerned about the stage in the action that this application is made. I am concerned about the impact on a fair trial which Father O'Reilly as a pro se would have.

My understanding of the term "discharge" when applied to the relationship between an attorney and his client means something different than "discharge" in the context of Father O'Reilly's application. A discharged attorney in normal course disappears.

In this situation there would be only one practical effect if I granted Father O'Reilly's application. Father O'Reilly and Mr. O'Reilly would still sit at counsel table together. The additional step that would be added to the process would be that there would be two openings, there would be two summations, there would be two cross examinations of every witness, there would be a summation by Father O'Reilly in Roman collar before a jury.

(Footnote continued)

Father O'Reilly appealed and, over the opposition of counsel for the Times, a panel of this court granted his motion that the appeal be expedited.

Appealability

Appellee would have us analogize the order here at issue to one denying a motion to disqualify counsel, which we have held to be unappealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949), see *Armstrong v. McAlpin*, 625 F.2d 433 (2 Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981), a position subsequently upheld by the Supreme Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). Appellant contends that the closer analogy is to an order granting a motion to disqualify counsel which we have long held to be appealable under the *Cohen* doctrine, see *Fleischer v. Phillips*, 264 F.2d 515, 517, *cert. denied*, 359 U.S. 1002 (1959), a position reaffirmed in *McAlpin, supra*, 625 F.2d at 440-41. Although neither analogy is perfect, the latter

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The absence of any showing that Mr. O'Reilly's representation has been less than adequate is a glaring absence. I find that there would be a distinct prejudice to the defendant in this case to permit Father O'Reilly to represent himself pro se, but I find beyond that that he would not be representing himself pro se, that it is impossible, given the personal relationship between him and his present attorney, which is that of brother to brother, with the necessary professional relationship which would have to continue to exist, it would be impossible for this to be a truly pro se representation.

It would only be pro se in the sense that Father O'Reilly would be able to play two roles. One as witness and one as advocate, and I shall not permit that to happen.

In my judgment there is no constitutional right in the particular circumstances of this case for Father O'Reilly to be permitted to go through the motions of purporting to represent himself when in substance the only change would be the gaining of a distinct and very substantial litigation advantage.

seems closer. Rev. O'Reilly has not sought to disqualify his brother; he has simply discharged him. What the district court has done in effect is to disqualify Rev. O'Reilly from representing himself; at the instance of the adverse party it has forced upon him counsel whom he does not want. The practical effect of a *denial* of a motion to proceed *pro se* is thus the same as that of a *grant* of a motion to disqualify—namely, the losing party must go forward in the litigation with representation not of his choosing. *Cf. McAlpin, supra*, 625 F.2d at 440.

Analogies aside, direct application of the three-part "collateral order" test, set forth jn *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and repeated in *Firestone, supra*, 449 U.S. at 375, points toward the appealability of the order here at issue. Under this test an order comes within the *Cohen* doctrine if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the case, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand, supra*, 437 U.S. at 468-69. The only element here in doubt is the third.[4] It is true, of course, that if plaintiffs should prevail to their entire satisfaction, there will be no need to review the order here in question. There can be no assurance, however, that they will in fact prevail; indeed the Times asserts it is entitled to summary judgment. If such summary judgment should be granted or the case should be decided in

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[4] There is nothing to indicate that Judge Broderick's denial of Rev. O'Reilly's application is in any way "tentative, informal, or incomplete", *Cohen, supra*, 337 U.S. at 546. The issue raised by the appeal is "important", both in its "public significance" and its "consequences to the parties", see *McAlpin, supra*, 625 F.2d at 452 n.1 (Newman, J., concurring in part), and the order can be reviewed without exploration of the merits of the underlying libel action.

the Times' favor after a trial, or the case should be decided in Rev. O'Reilly's favor but with what he deems an inadequate award of damages, Rev. O'Reilly might well be required to appeal to show that he would not have lost if he had been permitted to represent himself. Unless it could be established that William had done something clearly against his interests, as would be unlikely, this burden would be "almost insurmountable", *McAlpin, supra*, 625 F.2d at 441, and thus the order denying his motion to proceed *pro se* would be "effectively unreviewable" within the meaning of the *Cohen* doctrine. To be sure, Rev. O'Reilly's burden on appeal from an adverse final judgment would be greatly lightened if there were a presumption of prejudice from an erroneous denial of the statutory right of self-representation. The Times naturally does not concede the existence of any such presumption—it says only that if we defer review until after judgment we will "have the benefit of a full record with which to assess Judge Broderick's order", Brief at 13—and, whatever the situation in criminal cases may be, see *United States v. Plattner*, 330 F.2d 271, 273 (2 Cir. 1964) (prejudice presumed from erroneous denial of the constitutional right of self-representation); *United States v. Dougherty*, 473 F.2d 1113, 1127-28 (D.C. Cir. 1972) (harmless error doctrine inapplicable to denial of right of self-representation); *Chapman v. United States*, 553 F.2d 886, 891-92 (5 Cir. 1977) (same); *cf. Holloway v. Arkansas*, 435 U.S. 475, 487-91 (1978) (prejudice presumed when court improperly requires joint representation over timely objection), we know of no authority suggesting any such presumption in a civil case. We therefore hold the order here to be appealable.

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We start with the proposition that the right to self-representation in civil cases conferred by § 35 of the Judiciary Act of 1789, although not enjoying the constitutional protection subsequently afforded to the right of self-representation in criminal cases, *Faretta v. California*, 422 U.S. 806 (1975), is a right of high standing, not simply a practice to be honored or dishonored by a court depending on its assessment of the desiderata of a particular case. As the Court said in *Faretta, supra*, 422 U.S. at 830 n.39: "The Founders believed that self-representation was a basic right of a free people."[5] Section 1654 comes to us freighted with history; it calls back visions of days when much litigation, especially on the "law side", was carried on by strong self-reliant citizens who preferred to appeal to the sense of justice of "the country" rather than entrust their causes to lawyers trained in the intricacies of the law. In light of all this and with a citation to *Faretta*, we recognized in *Phillips v.*

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[5] The sources of this belief were several—the widespread confidence in the ability of the average individual to manage all his own affairs; the keen distrust of lawyers which took hold early in the colonial period and quickly established itself as an American "institution", see D. Boorstin, The Americans: The Colonial Experience 197 (1958); L. Friedman, A History of American Law 81-83 (1975); the lingering memories of the Star Chambers's practice of compulsory counsel; and the natural law thinking that dominated the Revolutionary period. See *Faretta, supra*, 422 U.S. at 826-30. Tom Paine's statement made in defense of the 1776 Pennsylvania Constitution, quoted by the *Faretta* court at 422 U.S. at 830 n.9, doubtless expressed the prevailing view of the relationship between the right of self-representation and the right to counsel. The "right to plead [one's] own cause", Paine said, is a "natural right"; the "right of pleading by proxy, that is, by a council" is a "civil right", an "appendage" to the natural right which supplements rather than supplants it. Section 1654, like its lineal ancestor in the First Judiciary Act, follows Paine's analysis. The right of self-representation is first accorded; representation by counsel is then recognized as an alternative.

Tobin, 548 F.2d 408, 411 (1976), the "long established principle that in the federal courts the parties have the right to plead and conduct their own cases . . . .", although holding the principle inapplicable when a layman sought to represent a corporation of which he was a stockholder in a derivative suit.

The few qualifications which this court has put on the clear language of the self-representation clause of § 1654 are consistent with its high purpose. One such qualification, enunciated in criminal cases, see *United States v. Bentvena*, 319 F.2d 916, 938 (2 Cir. 1963); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2 Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966), but equally applicable in civil cases, is that the right to self-representation must be timely asserted. The right is "unqualified" if invoked prior to trial but is "sharply curtailed" if first asserted after the trial has begun. *Denno, supra*, 348 F.2d at 15. An untimely request is committed to the discretion of the trial court, which may consider, among other factors, the reason for the request, the quality of the counsel representing the moving party, the party's prior proclivity to substitute counsel, and the potential disruption to the proceedings. See *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2 Cir. 1976). Rev. O'Reilly asserted his right in timely fashion, well before trial. The fact that his request came swiftly on the heels of defendant's notice of motion for summary judgment does not make it untimely under *Denno* or confer discretion on the judge to treat it as such.

A second qualification recognized in our cases is that the rights of self-representation and representation by counsel "cannot be both exercised at the same time." *United States v. Mitchell*, 137 F.2d 1006, 1010 (2 Cir. 1943), *cert. denied*, 321 U.S. 794 (1944). Although a trial

judge may in his discretion permit a party to enjoy both halves of the statutory right, see *United States v. Swinton,* 400 F.Supp. 805, 806 (S.D.N.Y. 1975) and cases cited therein, Section 1654 does not itself confer any right to "hybrid representation". *United States v. Wolfish,* 525 F.2d 457, 462-63 (2 Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976). *Accord, United States v. Hill,* 526 F.2d 1019 (10 Cir. 1975), *cert. denied,* 425 U.S. 940 (1976); *United States v. Daniels,* 572 F.2d 535 (5 Cir. 1978). Thus, a party seeking to assert his statutory right of self-representation must clearly and unequivocally discharge any lawyer previously retained. See *Wolfish, supra,* 525 F.2d at 462. Rev. O'Reilly has done just that. In his initial letter to Judge Broderick of April 29, 1982, he stated that "I have discharged my attorney, William O'Reilly, [and] . . . shall henceforth plead and conduct my own case on a *pro se* basis." He repeated this in his letters to the court of May 3 and May 7, 1982, as well as in the oral argument on his formal motion.

Notwithstanding this, the Times contends here, as it did before Judge Broderick, that what Rev. O'Reilly really seeks, despite his avowals, is "hybrid representation". In support of this contention it cites our decision in *United States v. Private Brands, Inc.,* 250 F.2d 554 (2 Cir. 1957), *cert. denied,* 355 U.S. 957 (1958). In that case a corporation and Carey, its President and controlling stockholder, had been jointly prosecuted for fraudulently misrepresenting the quality of chloroform sold to Government agencies. On the day trial was to begin, but before a jury was empanelled, Carey sought permission to proceed *pro se* and to have Driscoll, the attorney who had up to that point represented both him and the corporation, continue to represent the latter. The trial court

denied Carey's request and we affirmed. In a passage on which appellee seizes, we stated:

> In the case at bar Mr. Carey in effect wished to be represented by the attorney for the corporation, *whose interests were identical with his own,* and also act as his own attorney. The trial judge may well have thought this would cause delay and confusion in the trial. We cannot see any abuse of discretion in the way he handled the matter . . . . (emphasis supplied)[6]

Appellee argues that the present case is on all fours with *Private Brands.* It points our that while Rev. O'Reilly has purportedly "discharged" his brother William, the latter will continue to represent not only the other individual plaintiffs but the corporate plaintiff, Contemporary Mission, Inc. This argument, however, overlooks the fact that the interests of Contemporary Mission and Rev. O'Reilly, unlike those of Private Brands and Carey, are not identical, much less conceded to be so. As Rev. O'Reilly pointed out in argument, both in the district court and here, certain of the alleged libels—that he had forged documents for his ordination, that he had married in defiance of rules of the Roman Catholic Church and had avoided excommunication only by switching to the Eastern Rite—were directed at him, not at the Mission nor even, in some cases, at any of the other priest-plaintiffs.

We do not find any of the other reasons assigned by the judge adequate to justify denying Father O'Reilly's statu-

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6 See also 250 F.2d at 556:

> Mr. Driscoll, a competent lawyer, selected by Mr. Carey to represent him and his corporation, whose interests were conceded to be identical.

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tory right of self-representation. The first reason was that:

> [I]t would be disruptive to the process of the trial to have Father O'Reilly represent himself. If he had originally intended to represent himself, it might have been a different story.

The first sentence is conclusory[7] and will be considered in connection with the judge's other reasons. The second sentence is irrelevant; indeed it is very nearly an admission that the other reasons lack merit. The next reason was that William O'Reilly, though "discharged", would not "disappear" but instead would continue to represent Contemporary Mission and the other individual plaintiffs. The only "practical effect" of granting Rev. O'Reilly's motion would thus be that:

> . . . . there would be two openings, there would be two summations, there would be two cross examina-

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7 It is far from clear what sort of "disruption" the judge anticipated. Given Rev. O'Reilly's inexperience with the rules of evidence and with courtroom protocol, a certain amount of confusion, delay, even irregularity, would be expected. But this sort of "disruption" accompanies *pro se* representation generally; it is a price the Framers of the Sixth Amendment and the First Judiciary Act thought well worth paying. See *United States v. Dougherty, supra*, 473 F.2d at 1124-25. In any event, Rev. O'Reilly's performance at the oral argument on his motion should have diminished fears of this sort.

If, on the other hand, the judge thought that Rev. O'Reilly was likely to engage in deliberately disruptive or obstreperous conduct, the measure he chose was far too drastic. A potentially unruly, disrespectful, or overly passionate *pro se* may be clearly and firmly forewarned that he will lose his right of self-representation if he obstructs the trial or creates "a scene". *Cf. Illinois v. Allen*, 397 U.S. 337 (1970) (disruptive behavior may operate as constructive waiver of right to be present at trial). But the mere possibility of such disruption, especially if it is as unlikely as it appears to be here, is not a sufficient reason for denying the right of self-representation at the start. See *Dougherty, supra*, 473 F.2d at 1126.

tions of every witness, there would a summation of Father O'Reilly in Roman collar before a jury.

Except for the matter of the Roman collar,[8] this prospect of multiple arguments, examinations, and the like, is presented in every case where there are several parties on

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[8] In *La Rocca v. Lane*, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968 (1976), the New York Court of Appeals upheld a trial judge's order requiring a lawyer, who was also a Roman Catholic priest, to doff his collar while appearing as criminal defense counsel in a jury trial. The court reasoned that some jurors might interpret the collar as an implied assertion of the defendant's innocence, while other jurors might transfer their religious prejudices from the lawyer-priest to his client. In either event the fairness of the trial would be seriously threatened. The court therefore held that the interest of the defendant and the state in a fair trial outweighed the lawyer-priest's interest in the free exercise of his religion. See also *La Rocca v. Gold*, 662 F.2d 144 (2 Cir. 1981) (holding that La Rocca was barred by collateral estoppel from relitigating the issue in an action under 42 U.S.C. § 1983).

The present case is distinguishable from *La Rocca*, assuming we should decide to apply it in a federal court. Rev. O'Reilly is not a lawyer who happens also to be a priest; he is a priest who happens also to be a *pro se* plaintiff in a civil action. There is little question that were he to appear at trial only as a party and a witness in his own behalf he would not be expected to remove his collar. *Cf. Close-It Enterprises v. Weinberger*, 407 N.Y.S.2d 587 (App. Div., 2d Dept. 1978) (orthodox Jew must be permitted to wear skullcap when appearing as party). We can see no reason why his assumption of the further role of advocate in his own behalf should be conditioned on his doffing his everyday clerical garb.

It is important to recognize that the present case is highly unusual in that one of its central contested issues is whether Rev. O'Reilly is what he holds himself out, by his dress and otherwise, to be—namely, a full-fledged ordained priest in good standing. To require him to remove his collar, therefore, would not merely infringe on his First Amendment rights but also seriously prejudice his cause in the eyes of the jury. Neither voir dire nor jury instructions could overcome the impression that the court thinks him a fraud. In contrast, any prejudice to the Times can be cured by voir dire and jury instructions. It should be enough to explain that Rev. O'Reilly is simply being permitted to wear his everyday dress and that no inference as to his religious standing is to be inferred therefrom. Given these unusual circumstances we need not decide whether a *pro se* priest can or should be required to remove his collar when the action to which he is a party in no way implicates his religious standing.

one side and only one on the other and the former do not unite behind the same counsel. Such cases do indeed enhance problems of trial management, many of which are routinely resolved by obtaining the parties' cooperation. Where such cooperation is not forthcoming, the trial judge has ample powers to prevent duplication and minimize unfairness. Thus, in the present case, the judge can require William O'Reilly to initiate direct and cross-examination, can intervene to prevent repetitious examination of witnesses or other abuses in cross-examination and can allocate the same amount of time for opening and summation to each side, leaving it to the O'Reilly brothers to divide their time as they see fit. The third reason, the "glaring absence" of "any showing that Mr. O'Reilly's representation has been less than adequate", is irrelevant or worse; a party's right to discharge counsel prior to trial and represent himself does not require any showing of inadequacy. The fourth reason, that "there would be a distinct prejudice to the defendant in this case to permit Father O'Reilly to represent himself pro se," is again conclusory and adds nothing to the points more specifically stated. The fifth reason was that the fraternal relationship between Rev. O'Reilly and William O'Reilly would make it "impossible for this to be truly a pro se representation." We see nothing in § 1654 that warrants denial of self-representation simply because a party's brother is representing other parties. Moreover, the likelihood that the brothers will confer and even coordinate trial strategy does not distinguish the case from any other in which multiple parties have different lawyers. The sixth reason, that "[i]t would only be pro se in the sense that Father O'Reilly would be able to play two roles, [o]ne as witness and one as advocate", applies in every case of self-representation; if this is an evil, it is one which the

first Congress was willing to countenance and which none of its successors has seen fit to remedy. The seventh and last reason was that:

> [T]here is no constitutional right in the particular circumstances of this case for Father O'Reilly to be permitted to go through the motions of purporting to represent himself when in substance the only change would be the gaining of a distinct and very substantial litigation advantage.

The right while indeed statutory rather than constitutional is nonetheless entitled to respect, and the litigation advantage of being able to appear both as witness and as counsel is one which, for better of for worse, parties have been granted in the federal courts since 1789. In sum, while the trial, if there be one, would almost certainly be calmer and easier for the judge to manage if Father O'Reilly had not decided to represent himself, such considerations do not justify refusal of the historic statutory right of self-representation.

At argument appellant requested that we assign the case to another judge. We deny this, having full confidence that Judge Broderick will preside over a trial, if there should be one, with complete fairness to both sides. We shall expect Father O'Reilly to give him full cooperation in this task.

Reversed.

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APPENDIX D

The newspaper article typed on the following pages appeared in the Saturday, November 1, 1980 edition of "The New York Times" (on the first and fourth pages of the second section or page 27 and page 30). As per the instructions of the clerk of this Court, this article is being typed and as in the original article, the subheads are in bold print.

**"Westport Priests
Beset by Church
And U.S. on Status"**

Five Roman Catholic priests whose religious status is being challenged by officials of their own church, as well as by three Federal agencies, say they have been misunderstood and harassed because they are unconventional clerics.

Now living here with all the trappings of wealth -expensive cars, a sumptuous house on two acres with walls of glass overlooking Long Island Sound and a private swimming pool -the five priests were, until recently, supporting themselves with a large tax-exempt mail-order business.

Amoung the items offered up to last June by the group of priests, called Contemporary Mission, were a bath oil described as weight-reducing, a book of golf tips and a "Living Cross" that, when coupled with a special prayer, was guaranteed to change your life "in just five days."

Tax Exemption Revoked

A decade ago, the priests -most of them young seminarians -were lauded nationally for their work in the slums of St. Louis. Musically talented, they appeared on televisionas well as the New York stage. But from the beginning they were shadowed by controversy. Church officials in St. Louis, led by John Cardinal Carberry, accused the priests of forging documents for their ordinations.

Now the Government contends the group's main purpose is not religious, but profit-making. In actions crucial to the mission's mail-order business, the Internal Revenue Service revoked its tax-exempt status and the United States Postal Service revoked its nonprofit mailing permit. The Mission is fighting both decisions in court.

The priests, who insist they are not rich, argue that there is no law prohibiting churches from running a mail-order house,

that they have run an honest business and have used the money to finance their work. Yet the mission's vast public court record with the Government, individuals and corporations raises questions about whether the priests may have cloaked a profitable business in the guise of a religious, tax-exempt organization.

The mission, which operated the mail-order business for four years until its postal permit was revoked in June, was eligible to mail its material at less than half the cost to a commercial business.

The priests say that the mission is a pious society and that its members perform all traditional priestly functions and good works, but other priests contradict them.

The mission members are the Revs. John T. O'Reilly of Boston; Patrick J. Berkery of Brooklyn; John F. Coyne of Bayside, Queens; Donald H. Middendorf of Waterbury, Conn., and Robert J. Cassidy of Iowa.

Connecticut Action Recalled

As evidence of the honesty of their operation, the priests point to a Federal report saying the United States Attorney's office in Connecticut declined, in January 1979, to prosecute charges of mail fraud against them because "the firm does supply the product in most instances."

But in 1977, the State of Connecticut got a cease and desist order against them for failing to deliver merchandise. In a separate action, the Postal Service charged them with fraud in the bath-oil sales.

The mission filed a $1 million countersuit against the Postal Service, now in the appeal stage, charging harassment, denial of due process and conspiracy by postal officials and members of another group of priests. Those priests once helped the mission get its tax-exempt status, but later signed statements saying they made a mistake.

Despite the mission's voluminous court

record, it is unclear how much money the mission has been making. The I.R.S. letter referred to the mission's "sizable" bank accounts, automobiles, stock investment accounts and boat, but gave no specific amounts.

Father O'Reilly said the profits of the mail-order business amounted to about $500,000 over four years. Recently the mission won nearly $1 million in a jury verdict against a printing business in a contract dispute with the mission, but the verdict is being challenged and the priests do not have the money yet.

Many Suits for Nonpayment

Amoung its troubles, the mission is being sued by the Small Business Administration for $300,000 for default of a loan. Other creditors, including banks, the Diner's club, an auto-leasing company, Saks Fifth Avenue, have sued for nonpayment of

bills. There is also a foreclosure judgement on the mission house here, which was purchased in 1972 for $250,000.

Father O'Reilly said that the mission had had financial problems since its inception, that many bills had been paid and that the priests intended to honor all obligations.

In St. Louis a decade ago, the seminarians dreamed of using profits from their musical talents to support their labors for the poor. They had appeared on the "Ed Sullivan Show" and in the touring company of the rock opera "Jesus Christ Superstar." Father O'Reilly later married the lead singer in the touring company and is now divorcing her. The mission priests also presented, in Carnegie Hall, a rock opera written by Father O'Reilly called "Virgin."

Under normal circumstances, Father O'Reilly's marriage would mean his automatic excommunication from the church, according to experts on canon law. But Father O'Reilly

said he had switched to the Eastern Rite of the Catholic Church, which allows married priests.

Ordinations Called Forged

The group's activities prompted some church officials to call them clerical dilettantes, and Cardinal Carberry refused to ordain them. Father Berkery had already been ordained, and theothers were ordained in 1971 in Connecticut by a visiting Bishop from Ghana.

But that same year the Bishop, the Most Rev. Peter K. Sarphong, later wrote to the Vatican saying he had been "misled" when he accepted documents supporting the ordinations of the priests, which St. Louis officials said had been forged.

The mission priests disclaimed knowledge of the forged documents, and they accused Cardinal Carberry, who is now retired, of conducting a smear campaign against them.

Since then the priests have been in a kind of canonical limbo, and it is difficult to clearly determine their status.

In a recent interview, Msgr. Andrew T. Cusack, an official with the Bridgeport Diocese, which now has jurisdiction over the mission priests, said they were "inactive" and "seeking reconciliation." In a letter to the government, he also said they were not recognized by the diocese and were "unable to function as Catholic priests."

But the Postal Service says it has another letter, allegedly sent by the monsignor, that says "their ordination and current canonical efforts have the full recognition of the church." The monsignor has denied writing that letter.

The priests, who say they have conducted thiusands of masses, weddings, funerals and other services in the last five years, do not hold public services at the mission house. Father O'Reilly and Father Berkery said they had conducted many services at St.

Catherine's Church in Greenwich, but the pastor of the church, the Rev. Vincent J. O'Conner, contradicted them.

Among their good works, Father O'Reilly and Father Berkery said, the Mission spent $25,000 trying to bring refugee children from the camps in Thailand to the United States, but he added that the effort had been unsuccessful so far.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN O'REILLY, *et al.*,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 2, 1988

RULE 28.1 LIST

Respondent The New York Times Company has no parent company. Respondent's subsidiaries (other than wholly owned subsidiaries) and affiliates are Northern SC Paper Corporation, Spruce Falls Power & Paper Company, Ltd., Donohue Malbaie Inc., and Gaspesia Pulp & Paper Company Ltd.

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Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978)..... 10

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983)..... 9

New York Times Co. v. Sullivan, 376 U.S. 154 (1964) . 8

Old Dominion Branch v. Austin, 418 U.S. 264 (1974).. 11

Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) 10

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980)..... 9

Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981)..... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-222

JOHN O'REILLY, *et al.*,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent The New York Times Company ("The Times") respectfully requests that this Court deny the petition for a writ of certiorari.

The decision below affirmed the grant of summary judgment to a newspaper defendant in a libel case after extensive discovery. Both the unanimous panel of the Court of Appeals for the Second Circuit and the District Court applied settled principles of libel law and well-established standards for the grant of summary judgment to the particular facts of this case. The courts below found that each of the petitioners were limited purpose public figures under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The courts below also found that there was no evidence of actual malice, much less clear and convincing evidence, which petitioners are required to show under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The petition raises no serious challenge to the careful reasoning of the Court of Appeals or the District Court. There is no reason for review by this Court.

COUNTERSTATEMENT OF THE CASE

Instead of a statement of the case, petitioners provide an unsupportable diatribe devoid of references to the record. We therefore set forth below the undisputed facts relevant to this petition, incorporating the District Court's meticulous findings and the Court of Appeals' affirmance of such findings.

A. Petitioners' History and Public Figure Status.

Petitioner Contemporary Mission, Inc. ("CMI") and its members are a self-styled religious group who make "religious communication [their] mission, apostolate and profession." (App. at 34a)* The four individual petitioners are the sole officers and directors of CMI and have been members of CMI since its incorporation in 1968. (*Id.*)

In the late 1960s, several members of CMI "formed a nationally known folk-rock group called The Mission Singers." (App. at 9a, 34a) They produced eighteen record albums, gave more than 200 concerts in over thirty-eight states, and appeared on many television and radio shows, including The Ed Sullivan Show, The Mike Douglas Show and The Joey Bishop Show. "Virgin," a rock-opera composed by petitioner O'Reilly, sold 20,000 copies. (App. at 9a-10a, 37a) Petitioners also published a syndicated column in over fifty newspapers for two years and published numerous books and articles on contemporary religious life. (App. at 10a, 37a-38a) Since their rise to prominence, CMI and the four individual petitioners have been the subject of extensive controversy concerning their religious status and other activities.

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* The appendix to the petition is cited as "App.", the petition as "Pet.", and the Joint Appendix in the Court of Appeals as "JA___".

(1) *Petitioners' Religious Controversies.* In 1968, when petitioners left the Montfort Fathers in St. Louis in a dispute over seminary training, their departure was "publicized by nationwide and worldwide news wire services" as a result, according to CMI, of "the fame and popularity" of the group's musical efforts. (App. at 10a, 35a) Three of the four individual petitioners had not yet been ordained, and over the next three years, they contacted approximately thirty bishops seeking one who would ordain them. In 1971, Bishop Peter Sarpong of Ghana ordained the three priests in Cromwell, Connecticut. (App. at 10a)

The ordinations provoked extensive public controversy, including allegations and counter-allegations by John Cardinal Carberry and other church officials in St. Louis, where petitioners lived, and by the petitioners. (App. at 10a, 36a) For example, an Archdiocesan newspaper published allegations that documents submitted in support of the ordinations had been forged. The disputes were widely reported by the press. Over 200 news articles about petitioners from more than sixty different publications located in over fifteen different states were submitted to the District Court by The Times. (App. at 10a)

At the time of these disputes, petitioners "openly availed themselves of the media, issuing press releases, making public statements and addressing 'open letters' to Cardinal Carberry of St. Louis." (App. at 10a-11a) Petitioners' "open letter" to Cardinal Carberry illustrated the public nature of the controversy:

> Thank you for doing so much recently for us members of the Contemporary Mission. Thanks to you, we have now become celebrities, almost household words. All the publicity you've given us—free of charge!—has helped our group immensely. We've been on so many radio talk shows, we've done so many television interviews in depth, that we can no longer keep track of it all. . . .
>
> We would also like to thank you for the thousands of dollars of free publicity you gave us in three issues of your house organ, the St. Louis Review. . . .

> Your little hoax about the allegedly forged letters was priceless. You attempted to implicate us in the forgery, but let's be honest: it seems more probable that *you* either fabricated those letters or else intimidated the authors enough so they would deny them. (App. at 11a)

(2) *Petitioners' Mail Order Business and Troubles with Government Agencies.* Petitioners have also engaged in an extensive nationwide mail order business, which has brought them into conflict with various governmental agencies. (App. at 15a, 38a) As the Court of Appeals noted, petitioners "have not been shy in seeking public attention through their business activities." (App. at 15a) Between 1976 and 1980, CMI mailed over twelve million solicitations for its various mail order products. (App. at 15a, 38a) The products themselves—including "The 'Living' Cross," "The Edgar Cayce Handbook for Health Through Drugless Therapy," "Young & Firm Reducing Bath," and the "Guaranteed Tax Plan 1977"—"by their very nature were certain to attract a degree of public attention." (App. at 15a)

Petitioners' business activities brought them "under the scrutiny of several state and federal governmental agencies, which received hundreds of complaints about Contemporary Mission"; additionally, CMI "has been involved in numerous lawsuits concerning its mail-order business." (App. at 15a) Several of CMI's products were removed from the market by the United States Postal Service pursuant to 39 U.S.C. § 3005, which forbids "obtaining money or property through the mail by means of false representations." (App. at 39a) After the Postal Service revoked CMI's non-profit mailing permit in 1980, CMI sued the Postal Service officials for alleged violations of its constitutional rights. The Court of Appeals for the Second Circuit affirmed the dismissal of that action, stating that CMI's lawsuit was "frivolous" and that its claims were "specious" and intended to "intimidate postal officials." *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 105, 106, 107 (2d Cir. 1981).

In September 1979, the Internal Revenue Service ruled that CMI was not tax-exempt. (JA 521, 715) The IRS found that CMI "serves exempt religious purposes no more than would a random distribution of 'self-improvement' selections available at an ordinary book store." In addition, the IRS found that CMI's "accumulation of funds (house, sizable bank accounts, automobiles, stock investment accounts, boat, etc.) is also evidence of a substantial, non-exempt, commercial purpose" and the "nature of the checks drawn" on its accounts is evidence that members were "free to make personal use" of CMI's earnings. (JA 719-20)

CMI's business practices were also investigated by the Bridgeport Better Business Bureau, the Westport Chamber of Commerce and the Westport Police Department. (App. at 38a) In February 1979, the Connecticut Department of Consumer Protection issued an administrative complaint against CMI charging that it had "accepted mail orders and payments for its merchandise and then failed to deliver either the ordered merchandise or refunds within a reasonable period of time." (App. at 38a-39a) CMI ultimately consented to a cease and desist order in which it agreed to stop the challenged practices. (App. at 39a)

B. The Article.

This petition arises from the publication in the November 1, 1980 edition of *The New York Times* of an article entitled "Westport Priests Beset by Church and U.S. on Status" (the "Article"). (JA 765) The Article concerned petitioners, their history and their misfortunes. The Article was based upon the extensive research of an experienced reporter. That research extended over a two-month period and included interviews with more than seventy persons, including three of the petitioners and their counsel, and a review of voluminous court records and clippings about the petitioners. (App. at 20a) The Article was edited by the regional and deputy regional editors, who together had over thirty years experience as journalists. The Article was also reviewed by The Times' religion editor and by

an attorney in The Times' legal department because of CMI's litigiousness. (*Id.*)

Petitioners challenged fourteen separate statements in the Article, which are set out in the Court of Appeals decision. (App. at 3a-6a) Both the Court of Appeals and the District Court painstakingly analyzed each of the fourteen statements that petitioners challenged. After determining that each of the petitioners were limited purpose public figures for the purposes of the statements in the Article, the lower courts concluded that petitioners had failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence with respect to any of the challenged statements. (App. at 30a, 104a, 108a)

C. Proceedings Below.

On November 20, 1980, petitioners filed their original complaint challenging three statements in the Article. (App. at 31a-32a) After two amendments to the complaint, petitioners ultimately challenged fourteen statements. (App. at 3a) Extensive discovery was pursued. (App. at 18a) The Times responded to petitioners' interrogatories and document requests, producing over 1,000 pages of documents, including the reporter's research file. Petitioners' initial deposition of the reporter lasted for five days. (JA 1086-87) Petitioners subsequently continued the deposition of The Times' reporter and also deposed three editors for a total of nine additional days. (JA 1089)

On November 12, 1982, The Times moved for dismissal and for summary judgment as to each of the fourteen claims contained in the second amended complaint. (JA 258-1041) Petitioners sought additional discovery, but the District Court denied petitioners' request, except as to discovery for which petitioners could demonstrate a need pursuant to Federal Rule of Civil Procedure 56(f). (App. at 33a-34a) The District Court subsequently heard oral argument over two days and, in a thorough and well-reasoned Memorandum Order, granted summary judgment to The Times dismissing all of petitioners' claims. (App. at 31a-111a) The Court also denied peti-

tioners' request for still more discovery pursuant to Rule 56(f). (App. at 95a-99a) After petitioners appealed, the Court of Appeals for the Second Circuit, in a thirty-page opinion, affirmed the District Court judgment dismissing the complaint. (JA 1a-30a) This petition followed.

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH SETTLED LAW AND PRESENTS NO REASON FOR THIS COURT'S REVIEW.

The Court of Appeals correctly held that the District Court properly granted summary judgment because petitioners are limited purpose public figures and they could not establish by clear and convincing evidence that The Times knew the statements in the Article were false or entertained serious doubts about their truth.* Both courts correctly applied the well-established standard for public figures set out in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and properly determined that petitioners had not shown clear and convincing evidence of actual malice, as required by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In their questions presented to this Court, petitioners fail to raise any reason for this Court's review. Petitioners do not allege, nor could they, the existence of a conflict between the decision of the Court of Appeals and a decision of this Court or some other court. Nor do petitioners raise any important constitutional or federal jurisdictional issues. Petitioners merely contend that the District Court and the unanimous panel of the

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* The District Court correctly held that many of the challenged statements were not actionable for the additional reasons that they were not defamatory or not false or both. (App. at 6a, 56a-69a) Moreover, many statements in the Article are not actionable because they are privileged, for example, as opinion or a fair and true report. Petitioners appear to seek review of whether the statements were privileged, but neither the Court of Appeals nor the District Court reached the additional bases for protection grounded in privilege because both found that there was insufficient evidence of actual malice with respect to each of the statements.

Court of Appeals erred in applying settled legal principles to the particular facts of this case. Petitioners' own questions show that the case does not warrant review by this Court. In any event, the courts below accurately applied this Court's precedents to the particular facts of this case.

A. The Lower Courts Correctly Held That Petitioners Were Limited Purpose Public Figures.

Both the Court of Appeals and the District Court held that, under *Gertz*, petitioners were limited purpose public figures with respect to statements dealing with the religious controversy surrounding petitioners' status as priests and with respect to the business controversy surrounding CMI's mail order business. (App. at 7a-16a, 69a-92a) Because petitioners were found to be public figures, they had to show by clear and convincing evidence that The Times published the Article with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). (App. at 16a, 51a) Both courts properly followed *Gertz* by examining the nature of the controversy and the petitioners' participation in the controversy.

Petitioners claim that they were not limited purpose public figures because they did not voluntarily inject themselves into the religious and business controversies. (Pet. at 27) The undisputed record evidence, however, showed that petitioners had "openly availed themselves of the media, issuing press releases, making public statements and addressing 'open letters' " in connection with the religious controversy, (App. at 10a-11a) and that they "invited public attention and comment by thrusting themselves into the forefront of the religious controversy . . . ." (App. at 14a)

The lower courts also held that petitioners' business controversy was "necessarily intertwined with the religious controversy," because petitioners "avowedly carried on their business activities in furtherance of their religious commitments . . . ." (App. at 14a, 92a) Moreover, petitioners sought "public attention" through their extensive business activities. (App. at 15a)

Other courts of appeals have held on similar facts that individuals were limited purpose public figures. *E.g., National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983) (foundation was a public figure because it thrust itself into the public eye through massive solicitation efforts and also through the claims and comments it made in the solicitations); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3rd Cir. 1980) (company voluntarily injected itself into a public controversy through the intensive and misleading advertising of its product, the sale of which led to numerous consumer complaints). (App. at 15a)

Petitioners claim that the lower courts did not distinguish between the corporation CMI and the individual petitioners and that there was no demonstration that "each plaintiff voluntarily injected himself" into a controversy. (Pet. at 18, 27) However, petitioners were "the sole officers and directors of Contemporary Mission and they have been members of Contemporary Mission since its incorporation in 1968." (App. at 16a) Although CMI was "technically a legally separate entity," the District Court found it "undeniably true that the individual [petitioners] controlled Contemporary Mission, Inc., determined its policies and were responsible for its actions, and that Contemporary Mission acted only through them." (App. at 61a-62a) Moreover, the Court of Appeals found "sufficient undisputed evidence in the record to establish that each of the priests participated in efforts to gain media attention for Contemporary Mission and the member priests in the early 1970's and that each bore responsibility for the business activities of Contemporary Mission." (App. at 16a)

Petitioners also argue that since the bulk of the events with respect to the religious controversy occurred in the early 1970's, this subject was no longer newsworthy and therefore did not "constitute a continuing controversy." (Pet. at 30) However, as the Court of Appeals recognized, petitioners' assertion is "largely belied by the fact they continued to thrust themselves into the public eye through the conduct of Contemporary Mission's business activities and have been involved in at least 35

other lawsuits since 1974, including several before this court . . . ." (App. at 12a) Moreover, the Court of Appeals noted that "the passage of time will not necessarily change an individual's status as a public figure" (App. at 12a), a holding entirely consistent with appellate precedent. *E.g.*, *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1235-36 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1256-57 (5th Cir. 1980) (involving a general purpose public figure), *cert. denied*, 452 U.S. 962 (1981); *see also Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

B. The Lower Courts Correctly Held That There Was No Evidence To Support A Finding Of Actual Malice.

The Court of Appeals correctly applied *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), to the facts of this case in holding that summary judgment was appropriate because petitioners "failed to come forward with sufficient facts to support a showing of actual malice by clear and convincing evidence." (App. at 30a, 103a) Indeed, the District Court, which rendered its decision prior to the decision in *Anderson*, found that petitioners had not offered "a scintilla of evidence" that The Times published any of the statements with actual malice. (App. at 103a)

Petitioners could not show that The Times ever harbored any doubts as to the accuracy of any of the statements in the Article. (App. at 103a) The Times had reliable sources for each of the statements, and neither the reporter nor her editors ever entertained any doubts, much less serious doubts, about the truthfulness of any of the statements. Petitioners could not provide any evidence of actual doubts, let alone clear and convincing evidence of such doubts. (App. at 20a)

In place of such evidence, petitioners offered only conclusory allegations. Petitioners claimed that The Times and its reporter sought to "blacken" and "wreck" the reputation of each peti-

tioner in this action. (App. at 100a) As the Court of Appeals stated, "[s]uch bare assertions of ill will are not sufficient to establish a triable issue of actual malice." (App. at 20a (citing *Old Dominion Branch v. Austin*, 418 U.S. 264, 281-82 (1974))) Petitioners also contended that the reporter ignored their purported denials and refused to adopt their version of the facts. The District Court correctly pointed out that "[p]ublication in the face of a denial by [petitioners] does not demonstrate actual malice." (Pet. at 101a (citing *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977)) As the Court of Appeals and the District Court held, petitioners utterly failed to make the requisite evidentiary showing.

C. The Lower Courts Correctly Held That Petitioners Were Not Entitled to Additional Discovery.

Petitioners also suggest that summary judgment should have been refused in order to allow them still more discovery under Fed. R. Civ. P. 56(f). (Pet. at 1) In light of the extensive discovery conducted by petitioners, the Court of Appeals correctly held that "the district court was well within its discretion in denying [petitioners'] request for additional discovery under Rule 56(f)." (Pet. at 18a-19a, 95a-99a) The Times produced a huge volume of documents, including the reporter's research file and notes from certain conversations related to the Article. (App. at 18a) Petitioners deposed the reporter for eight days and deposed three other Times employees. (*Id.*) Two deadlines for various discovery had already passed. The District Court was well within its discretion in refusing to allow still further discovery. *See Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 928 (2d Cir. 1985).

* * * *

The lower courts applied well-settled legal standards to the particular facts of this case and correctly concluded that summary judgment was warranted. The Court of Appeals properly affirmed the District Court's findings that petitioners are limited purpose public figures and that they "have not offered a scintilla of evidence" that The Times knew the statements in the

Article were false or had serious doubts about their truth. (App. at 17a, 30a, 103a)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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